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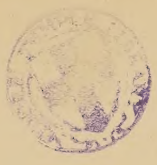

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PREFACE

TO THE THIRD EDITION.

This Edition of the work of the late Mr. L. A. Goodeve, which is intended to be a companion volume to the Fourth Edition of the Author's Book on the Modern Law of Real Property, has been in some parts re-written and has been carefully revised throughout.

Believing that a book of this character ought not to be ever increasing in bulk with each succeeding edition, the Editors, by further condensation wherever feasible, and by re-writing whenever any material alterations or additions were necessary, have succeeded in preventing any increase in the size of the volume, although much new matter has been added.

The codification of the law with respect to the sale of goods by the Sale of Goods Act, 1893, has made it necessary to re-write the Chapter upon that subject upon the lines of that statute; the Merchant Shipping Act, 1894, has necessitated considerable alterations in the Chapter on Ships; and some important additions will also be found in the Chapters

on Companies, Bankruptcy, Statutes of Limitation, and Devolution.

To some extent the Editors have departed from the scheme of the learned Editors of the Second Edition, and have, in general, dealt with the subject-matter wholly in the text, and have confined the notes almost entirely to the references to authorities and statutes. They have also to a greater extent than in the last edition given only the effect, and not the actual words, of statutory provisions.

References to all *recent* cases and statutes, which have a material bearing upon the various subjects, will be found in the notes, and it is hoped that this will render the work, which is primarily intended for students, more useful to practitioners.

The whole of the references have been carefully verified and corrected, and each Index has been thoroughly revised.

J. H. W.
W. M. C.

February, 1899.

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LIST OF ABBREVIATIONS.

A. & E.	Adolphus & Ellis's Reports.
Abb. Ship	Abbott's Law of Merchant Ships.
Add.	Addams' Ecclesiastical Reports.
Aleyn	Aleyn's Reports.
Amb.	Ambler's Reports.
And.	Anderson's Reports.
Anst.	Anstruther's Reports.
App. Cas.	Appeal Cases in Law Reports.
Atk.	Atkyns' Reports.
B. (after a name)	Baron of the Exchequer.
B. & A.	Barnewall & Alderson's Reports.
B. & Ad.	Barnewall & Adolphus's Reports.
B. & C.	Barnewall & Cresswell's Reports.
B. & P.	Bosanquet & Puller's Reports.
B. & S.	Best & Smith's Reports.
B. N. C.	Bingham's New Cases.
Bac. Ab.	Bacon's Abridgment.
Barn. Ch. Rep.	Barnardiston's Chancery Reports.
Beav.	Beavan's Reports.
Bing.	Bingham's Reports.
Bl.	Blackstone's Commentaries.
Bli.	Bligh's Reports.
Bli. N. S.	,, ,, New Series.
Bos. & P.	Bosanquet & Puller's Reports.
Bos. & P. N. R.	,, ,, New Reports.
Br. & L.	Browning & Lushington's Reports.
Bract.	Bracton de Legibus Angliæ.
Bro. Ab.	Brooke's Abridgment.
Bro. C. C.	Brown's Chancery Cases.
Bro P. C.	Brown's Parliamentary Cases.
Brod. & B.	Broderip & Bingham's Reports.
Brow. & Lush.	Browning & Lushington's Reports.
Buck	Buck's Cases in Bankruptcy.
Bulst.	Bulstrode's Reports.
Burr.	Burrow's Reports.
Byth.	Bythewood's Conveyancing.

C. (after a name)	Lord Chancellor.
C. A.	Court of Appeal.
C. B.	Common Bench Reports (or, after a name, Chief Baron).
C. B. N. S.	,, ,, ,, New Series.
C. P.	Common Pleas.
C. & E.	Cababé & Ellis's Reports.
C. & K.	Carrington & Kirwan's Reports.
Car. & M.	Carrington & Marshman's Reports.
C. & P.	Carrington & Payne's Reports.
Camp.	Campbell's Reports.
Car. (in citing Statutes)..	Charles.
Cary	Cary's Reports.
Ch.	Chancery Appeals, in the Law Reports.
Cha. Ca.	Chancery Cases.
Ch. D.	Chancery Division.
Cl. & F.	Clark & Finnelly's Reports.
Co. Cop.	Coke's Copyholder.
Co. Litt.	Coke upon Littleton.
Coll.	Collyer's Reports.
Com.	Comyn's Reports.
Com. Dig.	Comyn's Digest.
Comb.	Comberbatch's Reports.
Cowp.	Cowper's Reports.
Cox	Cox's Reports.
Cr. & J.	Crompton & Jervis's Reports.
Cr. & M.	Crompton & Meeson's Reports.
Cr. M. & R.	Crompton, Meeson & Roscoe's Reports.
Cr. & Ph.	Craig & Phillips's Reports.
Cro. El.	Croke's Reports, *temp.* Elizabeth, James 1, and Charles 1.
Cro. Jac.	
Cro. Car.	
Cruise Dig.	Cruise's Digest.

D. & L.	Dowling & Lowndes' Practice Cases.
Da.	Davidson's Conveyancing.
Dart, V. & P.	Dart's Law of Vendors and Purchasers.
De G.	De Gex's Bankruptcy Reports.
De G. & Sm.	De Gex & Smale's Reports.
De G. F. & J.	De Gex, Fisher & Jones's Reports.
De G. J. & S.	De Gex, Jones & Smith's Reports.
De G. M. & G.	De Gex, Macnaghten & Gordon's Reports.
Dea. & C.	Deacon & Chitty's Reports.
Dick.	Dickens's Reports.
Dods.	Dodson's Reports.
Doug.	Douglas's Reports.
Dow & Cl.	Dow & Clark's Reports.
Dr. & W.	Drury & Warren's Reports.
Drew.	Drewry's Reports.
Dy.	Dyer's Reports.
Dyer	

East	East's Reports.
Eden	Eden's Reports.
E. & B.	Ellis & Blackburn's Reports.
E. B. & E.	Ellis, Blackburn & Ellis's Reports.
E. & E.	Ellis & Ellis's Reports.
Elph. Introd.	Elphinstone's Introduction to Conveyancing.
Elph. & Cl. Searches	Elphinstone & Clark on Searches.
Elph. N. & C. Interp.	Elphinstone, Norton & Clark on Interpretation of Deeds.
Eq.	Equity Cases, in the Law Reports.
Esp.	Espinasse's Reports.
Ex.	Exchequer. / Exchequer Reports.
Ex. D.	Exchequer Division (in Law Reports).
F. & F.	Foster & Finlason's Reports.
Finch Pre. Ch.	Finch's Precedents in Chancery.
Fitzgib.	Fitzgibbon's Reports.
Freem. Ch. Ca.	Freeman's Reports in Chancery.
Giff.	Giffard's Reports.
Gilb.	Gilbert's Cases in Law and Equity.
Gow	Gow's *Nisi Prius* Cases.
H. Bl.	Henry Blackstone's Reports.
H. & C.	Hurlstone & Coltman's Reports.
H. & M.	Hemming & Miller's Reports.
H. & N.	Hurlstone & Norman's Reports.
H. L.	House of Lords.
H. L. C.	House of Lords Cases Reports.
Hagg. Ad.	Haggard's Admiralty Reports.
Hagg. Ecc.	Haggard's Ecclesiastical Reports.
Ha. / Hare	Hare's Reports.
Hob.	Hobart's Reports.
Inst. / Instit.	Coke's Institutes.
Ir. R.	Irish Reports.
J. (after a name)	Judge or Justice.
J. & W. / Jac. & W.	Jacob & Walker's Reports.
J. B. Moo.	J. B. Moore's Reports.
Jac.	Jacob's Reports (or, in citing Statutes, James).
Jarm. Conv.	Jarman's Conveyancing.
Jenk. Cent.	Jenkins' Centuries.
Johns.	Johnson's Reports.
Jo.	Jones's Reports.

Jo. & Lat.	Jones & Latouche's Reports.
J. & L.	
Jur.	Jurist Reports.
Jur. N. S.	,, ,, New Series.
K. B.	King's Bench.
K. & E.	Key & Elphinstone's Compendium of Precedents.
Kay	Kay's Reports.
K. & J.	Kay & Johnson's Reports.
Keb.	Keble's Reports.
Keen	Keen's Reports.
L. C.	Lord Chancellor.
	Leading Cases.
L. J.	Law Journal Reports.
	(after a name) Lord Justice.
L. Q. R.	Law Quarterly Review.
L. R.	Law Reports.
L. T.	Law Times Reports.
L. & Goo. ca. *temp.* Plunk.	Lloyd & Goold's Reports, *temp.* Plunkett.
Ld. Raym.	Lord Raymond's Reports.
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lib. Ass.	Liber Assisarum (Year Books).
Litt.	Littleton's Tenures.
Lofft	Lofft's Reports.
Lush.	Lushington's Admiralty Reports.
M. L. R. P.	Goodeve's Modern Law of Real Property (4th edition).
M. R.	Master of the Rolls.
M. & Cr.	Mylne & Craig's Reports.
M. & Gr.	Manning & Granger's Reports.
M. & Rob.	Moody & Robinson's Reports.
M. & Ry.	Manning & Ryland's Reports.
M. & S.	Maule & Selwyn's Reports.
M. & W.	Meeson & Welsby's Reports.
Mac. & G.	Macnaghten & Gordon's Reports.
Macq.	Macqueen's Reports.
Macr. Pat. Cas.	Macrory's Patent Cases.
Madd.	Maddock's Reports.
Man. & Gr.	Manning & Granger's Reports.
Mer.	Merivale's Reports.
Mod.	Modern Reports.
Mo.	Moore's Reports.
Moo.	
Moo. P. C.	Moore's Privy Council Reports.
Morrell	Morrell's Bankruptcy Cases.
My. & Cr.	Mylne & Craig's Reports.
My. & K.	Mylne & Keen's Reports.

N. C.	Notes of Cases, or New Cases.
N. R.	New Reports.
N. S.	New Series.
Noy	Noy's Reports.
Ow.	Owen's Reports.
P.	Probate, Divorce & Admiralty Cases (in Law Reports since 1890).
P. C.	Privy Council.
P. D.	Probate Division (in Law Reports, 1876—1890).
P. Wms.	Peere Williams' Reports.
Peake	Peake's Reports.
Ph.	Phillips' Reports.
Phillim.	Phillimore's Reports.
Plow. / Plowd.	Plowden's Reports.
Price	Price's Reports.
Q. B.	Queen's Bench (Adolphus & Ellis's Reports, New Series).
Q. B. D.	,, ,, Division (in L. R. 1876—1890).
R. P. C.	Reports of Patent Cases.
R. R.	Revised Reports.
R. S. C.	Rules of the Supreme Court.
Raym.	Raymond (Lord Raymond's, or Thomas Raymond's, Reports).
Rep.	Coke's Reports (cited by Parts, not by Volumes).
Rep. Pat. Cas.	Reports of Patent Cases.
Rep. Ch.	Reports in Chancery.
Rob.	Robinson's Reports (Admiralty).
Roll. Ab.	Rolle's Abridgment.
Rose	Rose's Reports.
Russ.	Russell's Reports.
R. & M. / Russ. & M.	Russell & Mylne's Reports.
Ry. & M.	Ryan & Moody's Reports.
S. C.	Same Case.
Salk.	Salkeld's Reports.
Saund.	Saunders' Reports.
Sc. App.	Scotch Appeals (in Law Reports, 1865—1874).
Sch. & Lef.	Schoales & Lefroy's Reports.
Scott	Scott's Reports.
Seb. T. M.	Sebastian on Trade Marks.
Shep. Touch.	Sheppard's Touchstone.
Show.	Shower's Reports.
Sid.	Siderfin's Reports.
Sim.	Simons' Reports.
Sim. & St.	Simons & Stuart's Reports.

Sm. & G.	Smale & Giffard's Reports.
Sm. L. C.	Smith's Leading Cases.
Sol. J.	Solicitors' Journal.
Spence, Eq. Jur.	Spence's Equitable Jurisdiction of the Court of Chancery.
Stark.	Starkie's Reports.
Sty.	Style's Reports.
Sw. & Tr.	Swabey & Tristram's Reports.
Swab.	Swabey's Reports.
Swanst.	Swanston's Reports.
Swinb.	Swinburne on Wills.
T. M.	Trade Mark.
T. R.	Term Reports (Durnford & East).
T. & R.	Turner & Russell's Reports.
T. Raym.	Thomas Raymond's Reports.
Taunt.	Taunton's Reports.
Theob.	Theobald on Wills.
Tud. L. C.	Tudor's Leading Cases.
Turn. & Russ.	Turner & Russell's Reports.
Tyrw.	Tyrwhitt's Reports.
V. C.	Vice-Chancellor.
V. & B.	Vesey & Beames' Reports.
Vaugh.	Vaughan's Reports.
Ventr.	Ventris's Reports.
Vern.	Vernon's Reports.
Ves. Sen.	Vesey Senior's Reports.
Ves.	Vesey Junior's Reports.
Vin. Ab.	Viner's Abridgment.
W. Bl.	Sir Wm. Blackstone's Reports.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
W. Rob.	Wm. Robinson's Admiralty Reports.
W. & T. L. C.	White & Tudor's Leading Cases in Equity.
Webs. P. C.	Webster's Patent Cases.
Wils.	Wilson's Reports.
Wms. P. P.	Williams on Personal Property.
Wms. Pers. P.	Williams on Personal Property.
Wms. Saund.	Saunders's Reports by Williams.
Wms. Exors.	Williams on the Law of Executors.
Y. B.	Year Book.
Y. & C., C. C.	Younge & Collyer's Reports in Chancery.
Y. & C. Ex.	Younge & Collyer's Exchequer (Equity) Reports.
Y. & J.	Younge & Jervis's Reports.

ADDENDA ET CORRIGENDA.

Page 76, note (11). *Delete the words* "printed in Appendix."

,, 129, note (1). But see *Re Wasdale*, [1899] 1 Ch. 163.

,, 141, note (8). *Lower Rhine Assoc.* v. *Sedgwick*, in C. A., [1899] 1 Q. B. 179.

,, 218, note (11). *Manchester Brewery Co.* v. *North Cheshire Co.*, in H. L., [1899] A. C. 83.

,, 231, note (2). As to the meaning of "disclaimer," see *Re Owen*, [1899] 1 Ch. 157.

,, 268, note (5). *Add Statham* v. *Brighton Marine Co.*, [1899] 1 Ch. 199.

,, 278, note (10). See *Re Whitefriars Co.*, [1899] 1 Ch. 184; *Re Jarvis & Co.*, *ib.* 193; *Spiers and Bevan's Case*, *ib.* 210.

,, 360, note (4), and 362, note (9). *Att.-Gen.* v. *New York Co.*, in H. L., [1899] A. C. 62.

THE MODERN LAW

OF

PERSONAL PROPERTY.

CHAPTER I.

PROPERTY—POSSESSION.

According to English Law, property[1] is divided into real and personal,[2] personal property being again subdivided into chattels real and chattels personal. Real property and chattels real are interests in land, and in this treatise we shall confine ourselves to the consideration of chattels personal, that is, personal property other than interests in land.[3]

Classes of property.

The term "property" may be used to denote either things which are the subjects of rights, or the rights themselves.[4] If we consider chattels personal according to their nature, we may divide them into (1) corporeal chattels, *i.e.*, those which have an actual physical existence, which are capable of being touched, tasted or handled, such as money in specie, furniture, cattle, ships, and timber or minerals when severed from the land, and (2) incorporeal chattels, *i.e.*, those which have a mere notional existence, such as debts, including cash at a bank, Government stocks, shares and debentures of companies, patents and copyrights. On the other hand, if we consider them according to the rights that can be

Corporeal chattels.

Incorporeal chattels.

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[1] See the meaning of the term "*Property*," discussed in M. L. R. P., pp. 5 *et seq.*, and Campbell on Sale, 38 *et seq.*

[2] As to the origin and meaning of this division, see M. L. R. P., p. 6.

[3] As to chattels which by common law or custom are so far annexed to the land as to be descendible to the heir, see M. L. R. P. 11; as to fixtures, *ib.* 24.

[4] See M. L. R. P. 5.

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exercised over them, it is convenient to divide them into those of which the owner has and those of which he has not actual possession. Personal chattels of the former class consist of corporeal chattels in the possession of the owner, and are called "choses in possession;" those of the latter class, which are called "choses in action," consist of corporeal chattels not in possession of the owner, as, for example, when hired or lent to a stranger, and of incorporeal chattels.[1]

Choses in possession. Choses in action.

"Goods and chattels."

The words "goods and chattels,"[2] at the time when these terms were introduced into English law, were used to embrace all property not included under one or other of the terms "lands, tenements, and hereditaments;" and they are used in that sense at the present day as equivalent to personalty.

The precise origin of the word "chattel" is obscure. Coke says,[3] "'Goods,' *biens*, *bona*, includes all chattels as well real as personal. 'Chattels' is a French word and signifies goods, which by a word of art we call *catalla*." Blackstone says[4] that in the Grand Coustumier of Normandy the word "chattels" is used and set in opposition to a fief or feud, so that not only goods but whatever was not a feud were accounted chattels.

"The words '*bona et catalla*,' jointly or separately in our ancient statutes and law writers, denote personal property of every kind, as distinguished from real. Thus *Magna Charta*, c. 18, which provides that the King's debt shall be first paid, and the residue remain to the executors of the debtor, uses the words *bona et catalla*. So the statute 31 Ed. 3, stat. 1, c. 11, which is in French, directs the ordinary to depute the next friend of an intestate to administer his goods, *biens*, and then proceeds to enact that the persons deputed may have an action to recover, as executors, the debts due to the intestate."[5]

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[1] See *Colonial Bank* v. *Whinney*, 30 Ch. D. 282. The different classes of choses in action are discussed *post*, Chap. IX.

[2] As to what passes by "goods and chattels" in a grant, see Shep. Touch. 97, 98; and in a will, *Kendall* v. *Kendall*, 4 Russ. 370; that the phrase, as used in all Bankruptcy Acts from that of James I. downwards, includes choses in action, see *Colonial Bank* v. *Whinney*, 30 Ch. D. 280; and see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168. Choses in Action are not included in "goods, wares, and merchandizes" as used in the Statute of Frauds (29 Car. 2, c. 3), s. 17; *Humble* v. *Mitchell*, 11 A. & E. 205; nor in the word "goods" in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); or in the Factors Act, 1889 (52 & 53 Vict. c. 45); and probably not in "goods," in the Mercantile Law Amendment Act (19 & 20 Vict. c. 97); nor in "personal chattels" in the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.

[3] Co. Litt. 118*b*.

[4] 2 Bl. 385.

[5] Per Abbott, C. J., *Bullock* v. *Dodds*, 2 B. & Ald. 276; 20 R. R. 420.

Choses in possession and in action distinguished.

The distinction between choses in possession and choses in action has always been recognised by our law;[1] and the following points of difference may be here specially noted.

At common law, choses in possession have always been capable of being assigned by delivery,[2] or by deed.[3] On the other hand, choses in action are (with a few exceptions) incapable at common law of being assigned.[4]

Prior to the Married Women's Property Act, 1882,[5] a wife's choses in possession, to which she was entitled in her own right, vested absolutely in her husband on the marriage. Her choses in action, if the husband reduced them into possession by receiving them or recovering them by action, belonged to him; if he did not reduce them into possession, and the wife survived him, they remained her property. If the husband survived the wife, they belonged to him on taking out administration to her.[6]

Choses in possession could at common law be seized by the sheriff under a *fi. fa.*; choses in action could not, prior to 1 & 2 Vict. c. 110, be taken in execution.[7]

Property absolute, qualified, or possessory.

The rights that a man may have in chattels personal may be absolute, qualified, or possessory. He may have absolute property in inanimate objects, including trees and vegetables, when separated from the land,[8] and in animals *domitæ naturæ*, namely, those which we generally see tame and but rarely wandering at large; and, if an animal of this nature strays from his owner and is lost, the owner does not lose the property in it.[9]

Animals.

But a man cannot have absolute property in animals *feræ naturæ*. Coke says:—[10]

"Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain by two

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[1] See per Lord Blackburn, *Colonial Bank* v. *Whinney*, 11 App. Cas. 439; Bract. lib. 1, c. 12, para. 3, fol. 7*b* & lib. 2, c. 4, para. 2, fol. 10*b*.

[2] See *post*, Chaps. III., VI.

[3] See *post*, Chaps. VI., VII.

[4] See *post*, Chap. IX.

[5] 45 & 46 Vict. c. 75.

[6] See this explained per Cotton, L.J., in *Smart* v. *Tranter*, 43 Ch. D. 587, 592. *Post*, Chap. XXI.

[7] See *post*, Chap. XVII.

[8] As to emblements, see M. L. R. P. p. 17. As to who is entitled to timber improperly cut, see the notes to *Garth* v. *Cotton*, 1 W. & T. As to windfalls, see *Bagot* v. *Bagot*, 32 Beav. 509; *Honywood* v. *Honywood*, 18 Eq. 306; *Re Harrison*, 28 Ch. D. 220; *Re Ainslie*, 28 Ch. D. 89; 30 Ch. D. 485.

[9] *Ireland* v. *Higgins*, Cro. El. 125; Ow. 93. See also *Chambers* v. *Warkhouse*, 3 Lev. 336.

[10] *The Case of Swans*, 7 Rep. 17*b*. See the passage in the text commented on by Westbury, C., *Blades* v. *Higgs*,

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ways, by industry, or *ratione impotentiæ et loci;* (1) by *industry*, as by taking them, or by making them *mansueta, i.e., manui assueta*, or *domestica, i.e., domui assueta;* but in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, *scil.* so long as they remain tame, for if they do attain to their natural liberty, and have not *animum revertendi*, the property is lost; (2) *ratione impotentiæ et loci:* as if a man has young shovelers or goshawks, or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for if one takes them when they cannot fly, the owner of the soil shall have an action of trespass, *Quare boscum suum fregit, et tres pullos espervor' suor'*, or *ardear' suar' pretii tantum, nuper in eod' bosco nidificant', cepit, et asportav';* and therewith agreeth the Regist. and F. N. B. 86, L., and 89, K.; 10 Ed. 4, 14; 18 Ed. 4, 8; 14 H. 8, 1 *b.*; Stamf. 25 *b.* &c.; *vide* 12 H. 8, 4, and 18 H. 8, 12."

"But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges, and therefore in an action, *Quare parcum, warrennum, &c., fregit et intrav' et* 3 *damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say *suos*, for he hath no property in them, but they do belong to him *ratione privil'*, for his game and pleasure, so long as they remain in the privileged place."

Game.

The word "Property," when applied to animals *feræ naturæ*, including game, while they continue in their wild state, means no more than the exclusive right to catch, kill, and appropriate such animals; and this right is said to exist either *ratione soli* or *ratione privilegii*.

"Property *ratione soli* is the common law right, which every owner of land has, to kill and take all such animals *feræ naturæ* as may from time to time be found in his land; and, as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which, by a peculiar franchise antiently granted by the Crown by virtue of its prerogative, one man may have of killing and taking animals *feræ naturæ* in the land of another;[1] and, in like manner, the game when killed or

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11 H. L. C. 631. See also *Hannam* v. *Mockett*, 2 B. & C. 934; 26 R. R. 591; *Boulston's Case*, 5 Rep. 104 *b*; Coke's 4th Instit. 305; M. L. R. P. 20; *Colam* v. *Pagett*, 12 Q. B. D. 66; *Aplin* v. *Porritt*, [1893] 2 Q. B. 57; *Harper* v. *Marcks*, [1894] 2 Q. B. 319.

[1] The allusion appears to be to what
Free Warren. is known as the franchise of Free Warren (see Elph. N. & C. Interp. 629, s.v. *Warren; ib.* 580, s.v. *Forest*). But it would seem that a grant of Free Warren was always limited to a right in respect of the demesne lands of the grantee himself and did not extend to the lands of other persons; *A.-G.* v. *Parsons*, 2 Cr. & J. 279, 302. But a man may alien the land and retain the privilege of warren (*Sutton* v. *Moody*, 1 Ld. Raym. 251), or he may alien the warren and retain the land, and thus one may have free warren in the land of another. See 2 Bl. 28; *Dacre* v. *Tebb*, 2 W. Bl. 1151; *Carnarvon* v. *Villebois*, 13 M. & W. 313; Com. Dig. *Chase* (D.); Y. B. 3 Hen. 6, 13 B., pl. 15; Wil-

taken by virtue of this privilege, becomes the absolute property of the owner of the franchise." [1]

The notion that the Lord of a Manor, as such, has any right of sporting over lands other than his own, is exploded.[2]

If a man starts game on his own land and pursues it into the lands of another, and there kills it, the property remains in himself.[3]

Game killed without authority.

When game is taken or killed by a person without authority from the person entitled to do so, the rules at common law are the following:—[4]

(1.) If A. starts game on the lands of B., and takes and kills it there, it belongs to B.

(2.) If A. starts game on the lands of B., and takes and kills it on the lands of C., it belongs to A. (although he is a wrongdoer).

(3.) If A. starts game in a forest or warren belonging to B., and kills it on the lands of C., it belongs to B.

Of these rules, (1) and (2) appear to apply to all animals *feræ naturæ* at the present day. Mr. J. Williams[5] doubts whether the second rule has not been altered by 1 & 2 Will. 4, c. 32, s. 36.

At the present day, the occupier of land has, subject to any rights reserved by contract, and to the rights of the owner of a forest or warren, the right to take and kill game.[6] By the Ground Game Act, 1880,[7] the right to take and kill ground game (*i.e.*, hares and rabbits) is vested in the occupier of the land, as incident to and inseparable from his occupation, concurrently with any other person entitled so to do.

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liams on Rights of Common, p. 238. A warren imports some kind of enclosure for the purpose of confining animals within it; and the reason why none can have a park, chase, or warren without the King's licence is said to be that "it is *quodam modo* to appropriate those creatures which are *feræ naturæ et nullius in bonis* and to restrain them of their natural liberty . . . . but for hawking, hunting, &c., there needs no licence, for every one may, in his own land, use them at his pleasure;" *Case of Monopolies*, 11 Rep. 87*b*. See further, as to free warren, Herbert on Prescription, pp. 100, 140.

[1] Per Lord Westbury, C., in *Blades* v. *Higgs*, 20 C. B. N. S. 218; 11 H. L. C. 631.

[2] See *Sowerby* v. *Smith*, L. R. 9 C. P. 532, 533, per Cockburn, C. J.

[3] 2 Bl. 419.

[4] *Blades* v. *Higgs*, *sup.*; *Sutton* v. *Moody*, 1 Ld. Raym. 250; 12 Mod. 145.

[5] Wms. P. P. 135-6.

[6] 1 & 2 Will. 4, c. 32.

[7] 43 & 44 Vict. c. 47. See *Morgan* v. *Jackson*, [1895] 1 Q. B. 885.

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By the Wild Birds Protection Acts, 1880 to 1896,[1] a close time is provided, during which it is unlawful to kill or take any wild bird.

Movables and immovables.

Property can also be divided into immovable and movable things; immovable things consist of real property and chattels real; movable things consist of personal property exclusive of chattels real, and include choses in action.[2]

Succession to movables on death.

The succession to movable property (*i.e.*, to personal property excluding leaseholds for years) on the death of the owner is, in general, regulated by the law of the country in which he is domiciled at the date of his death,[3] not by the law of the country in which the property is situated; this is expressed by the maxim—"*mobilia sequuntur personam.*"[4]

For instance, if a man dies domiciled in France, leaving movable property situated in England, the rights of the persons who become entitled to it on his death are determined by the law of France, not by that of England. It must not, however, be supposed that the law of France is of any authority in England; all that we mean is that it is part of the law of England that in this case the rights of the parties shall be determined by the rules of French law.[5]

Leaseholds for years are, as a matter of fact, immovable, and the maxim *mobilia sequuntur personam* does not apply to them. If they are situated in England, English law is applicable to them, and, on the death of the owner, the rights of all parties are determined by that law, not by the law of his domicile.[6]

The student may have some difficulty in seeing how it is that

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[1] 43 & 44 Vict. c. 35; 44 & 45 Vict. c. 51; 57 & 58 Vict. c. 24; 59 & 60 Vict. c. 56.

[2] See this discussed M. L. R. P. 6.

[3] *Enohin* v. *Wylie*, 10 H. L. C. 1; *Ewing* v. *Orr-Ewing*, 9 App. Cas. 34. See *post*, Chap. xx.

[4] *Whicker* v. *Hume*, 7 H. L. C. 124; *Somerville* v. *Somerville*, 5 Ves. 750; *Re De Nicols*, [1898] 2 Ch. 60. The maxim "is a brief form of stating the principle that a person's movable property is for many purposes, and especially when it is dealt with as a whole, considered by a fiction of law as situated in the country where its owner is domiciled, and therefore subject to the laws of such country;" Dicey, Domicil, 167. But the effect of an individual assignment of movables is mainly governed by the law of the country where the thing is situated (*lex situs*); *ibid.* 157, 255; or where the transfer is made; *Alcock* v. *Smith*, [1892] 1 Ch. 238.

[5] See this discussed in an Article by Professor Dicey, 6 Law Quarterly, 1.

[6] *Freke* v. *Carbery*, 16 Eq. 461; *Re Gentili*, Ir. R. 9 Eq. 541; *Duncan* v. *Lawson*, 41 Ch. D. 394. See M. L. R. P. 17.

the devolution of a chose in action on the death of its owner is determined by the law of his domicile. He may object that it can only be recovered by an action against the debtor, and that therefore the law of the place where that action has to be brought, presumably the place where the debtor is domiciled, ought to prevail. No doubt that is the law which regulates the remedy for recovery of the chose in action; but the question how the thing is to be recovered is different from the question what is to be done with it when recovered; and it is the latter question which has to be determined by the law of the domicile of the deceased creditor.

Personal property, *i.e.*, movable property and chattels real, upon the death of the owner domiciled in England, in the absence of testamentary or other disposition, devolves upon an administrator appointed by the Court, and, after providing for the payment of the debts of the deceased, is distributed among his next of kin according to the Statute of Distributions.[1]

No "estate" in chattels personal.

Movable property, that is, personal property (excluding chattels real), is not the subject of tenure, but of absolute ownership, and, therefore, cannot be held for an "estate."[2] Although, in assigning an absolute interest in personal property, it is usual to assign it to A., "his executors, administrators, and assigns" (as an estate in land in fee simple is limited to a man, "his heirs and assigns"), a conveyance to A. simply, without adding "his executors, administrators and assigns," is equally effectual.

Settlements of personal property.

If it is desired to give only a limited interest, or to create interests in succession in personal property, the interposition of trustees is necessary, and the whole legal interest is vested in them, the beneficial interests being defined by a declaration of the trusts upon which they are to hold the property. For instance, supposing a man about to marry desires to settle a sum of stock for the benefit of his wife and the issue of the marriage, he transfers it into the names of trustees, and by the settlement declares that it shall be held by them on certain trusts, as for example, on trust to pay the income to his wife during the joint lives of himself and his wife, then to the survivor for life, and after the death of the survivor, on trust for the issue of the marriage on attaining majority, equally, or as

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[1] 22 & 23 Car. 2, c. 10. See *post*, Chap. xx.

[2] See M. L. R. P. 30. The phrase personal "estate" is sometimes used to denote personal property, in contradistinction to real estate.

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Executory bequests.

the parents may appoint, with powers of maintenance, education, and advancement in the meantime. But, in the case of disposition by will, the gift may be made directly to the successive takers, who, therefore, seem to take interests analogous to successive estates in land; but there can be no remainder in a chattel, real or personal; and in such cases the legal view is that the whole property vests in the first taker and shifts on the determination of his interest to the person next entitled. Such dispositions are often called executory bequests; and the Court will interpose for the protection of the successive interests, and thus preserve the property during the subsistence of the limited interests for the benefit of the person entitled to the absolute interest.[1] The nature of the property may prevent the possibility of the creation of future interests; thus, under a specific gift of articles *quæ ipso usu consumuntur*, they vest absolutely in the tenant for life or first taker, unless personal use by the tenant for life is not contemplated, or unless they form part of a stock in trade;[2] and even then the interest will be held to be absolute if the taker is not to be liable to account for any diminution or depreciation in the stock.[3] A limited interest of the nature of an estate tail cannot be created in personalty; an attempt to do so gives the absolute interest to that person who, if the subject-matter were realty, would be the first tenant in tail.

"For," says Blackstone,[4] "this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and therefore the law vests in him at once the entire dominion of the goods."

Probably the true reason is that personal property is not a tenement within the meaning of the Statute De Donis.[5]

Perpetuity.

The rule against perpetuities, that is, against deferring the vesting of an absolute interest in property beyond a limited period, applies equally to real and to personal property; and therefore personal property may not, any more than real property, be so disposed of as to render the *corpus* inalienable for a longer period than a life, or a number of lives, in being at the time of the disposition, and twenty-one years afterwards, with a further period of gestation where gestation in fact exists.[6]

[1] Jarman on Wills, i. 838.
[2] *Ib.*; and Theobald on Wills, 518.
[3] *Breton* v. *Mockett*, 9 Ch. D. 95.
[4] 2 Bl. 398.
[5] See M. L. R. P. 65.
[6] See M. L. R. P. 102, 286.

As in the case of realty, the periods during which income of personalty may be accumulated are prescribed by the Thellusson Act and the Accumulations Act, 1892.[1]

Ownership, joint, in common, or several.

Personal property may be owned by several jointly, or in common, or it may be owned by one in severalty in the same manner as real property.[2] Blackstone says:[3]

> "If a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements. And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship. So also, if £100 be given by will to two or more, *equally to be divided between them*, this makes them tenants in common; as the same words would have done in regard to real estates."

Partnership.

The maxim *jus accrescendi inter mercatores locum non habet* expresses the rule of law that there is no right of survivorship in chattels belonging to partners.[4] In truth, the share of each partner is not a share in any specific asset or any specific part of the assets, but is his share of what will ultimately come to him when the accounts are ascertained, and when the partners who are to contribute have contributed, and the assets are got in, the debts paid, and the property realised.[5]

Co-ownership, in which we include joint tenancy and tenancy in common, must be carefully distinguished from partnership. It is not easy to give a true definition of partnership. Perhaps the best description that can be given of partnership is that it is the relation subsisting between persons who have agreed to combine their property, labour, or skill, in some business, and to share the profits and losses thereof between them.[6] The definition in the Partnership Act, 1890,[7] is as follows:—"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit." The mere sharing of gross profits, with or without a common interest in

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[1] 39 & 40 Geo. 3, c. 98; 55 & 56 Vict. c. 58. See M. L. R. P. 105 *et seq.*

[2] M. L. R. P. 251. See *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202. As to severance, see *Re Wilks*, [1891] 3 Ch. 59.

[3] 2 Bl. 399.

[4] Co. Litt. 182 a.

[5] *Per* James, L.J., in *Ashworth* v. *Munn*, 15 Ch. D. 370; and see *Helmore* v. *Smith* (1), 35 Ch. D. 436; M. L. R. P. 28.

[6] Lindley on Partnership, 10; Pollock on Partnership, 1.

[7] 53 & 54 Vict. c. 39, s. 1 (1).

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the property whence the profits come, does not create a partnership.[1] Thus, an agent paid by his commission on the receipts is not a partner with his employer. It used to be considered that an agreement to share net profits, without more, constituted a partnership; but it is now decided that the question whether a partnership exists depends on the intention of the parties as shown by the whole facts of the case.[2]

Partnership distinguished from co-ownership.

The principal differences between co-ownership and partnership are stated by Lindley, L.J., as follows:—[3]

1. Co-ownership is not necessarily the result of agreement. Partnership is.

2. Co-ownership does not necessarily involve community of profit or of loss. Partnership does.

3. One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferor himself was before the transfer. A partner cannot do this.

4. One co-owner is not, as such, the agent, real or implied, of the others. A partner is.

5. One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has.

6. One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of a recent statute) to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or not, sold, and the proceeds divided.

7. As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate; whilst, as between the real and personal representatives of a deceased partner, the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate.

8. Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies, by way of account and otherwise, which one co-owner has against the others, are in many important respects different from, and less extensive than those which one partner has against his co-partners.

Liability of partners for debts of firm.

The firm is liable; in other words, the partners are jointly liable,[4] and in the case of mercantile contracts (at all events) each partner is severally liable for all debts and obligations incurred in

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[1] 53 & 54 Vict. c. 39, s. 2 (2).

[2] *Pooley* v. *Driver*, 5 Ch. D. 459; *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238; Partnership Act, 1890, s. 2 (3); *Re Young*, [1896] 2 Q. B. 484.

[3] Lindley on Partnership, 52.

[4] It must be remembered that, in English law, the firm is not an entity in the nature of a corporation, and has no existence distinct from the individuals composing it.

the usual course of partnership business by or on behalf of the firm. It need hardly be said that a partner is not liable to creditors of the firm in respect of any liability incurred by the firm before he became or after he ceased to be a member of it. A person who is in fact, though not known to the public to be, a partner, is liable to creditors of the firm, and a person who holds himself out to be a partner whereby credit is given to the firm, though he is not a partner, is liable to creditors of the firm in the same manner as if he were a partner.

Bovill's Act.

The hardship caused by the rule that an interest in the net profits of the business might make a man liable to third parties as a partner gave rise to an Act (known as "Bovill's Act"), which enacted that a loan to a person (including a firm, a company, and a corporation), engaged or about to engage in any trade or undertaking, upon a contract in writing that the lender should receive a rate of interest varying with the profits, or a share of the profits, should not *of itself* constitute him a partner;[1] that a contract for the remuneration of a servant or agent by a share of the profits;[2] or the receipt by way of annuity by the widow or child of a deceased partner of a portion of the profits;[3] or the receipt by way of annuity or otherwise of a portion of the profits in consideration of the sale of the goodwill of the business,[4] should not, *of itself*, constitute the servant, agent, widow, child, or vendor, a partner; but that, in the event of the bankruptcy of the trader, such lender or vendor should not be entitled to recover any portion of his principal or of the profits or interest payable in respect of the loan, until the claims of the other creditors should have been satisfied.[5] This Act was repealed and the above provisions substantially re-enacted by the Partnership Act, 1890.[6]

Joint chose in action.

When a chose in action is in joint names, for instance, stock in the public funds in the names of two trustees, the legal right is in the survivor alone,[7] though he may be responsible to others in equity.

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[1] 28 & 29 Vict. c. 86, ss. 1, 6.

[2] S. 2.

[3] S. 3.

[4] S. 4.

[5] S. 5. See generally upon the Act, Lindley on Partnership, 58 *et seq.*; *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238.

[6] 53 & 54 Vict. c. 39, ss. 2 & 3. See *Re Fort*, [1897] 2 Q. B. 495; *Re Young*, [1896] 2 Q. B. 484.

[7] *Crossfield* v. *Such*, 8 Ex. 825.

Possession.

Possession.

The word "possession" is ambiguous.[1] Its popular meaning does not exactly coincide with either of its legal meanings, and it has more than one legal meaning. "In common speech," says Sir F. Pollock, "a man is said to possess, or be in possession of, any thing of which he has the apparent control, or from the use of which he has the apparent power of excluding others."[2] For instance, a thief is in possession of a coat that he has carried off, though the true owner is entitled to the possession of it. A. lends a book to B.; here B. is lawfully in possession, but he is bound to give up possession to A. when A. demands it. In each of these cases there is the danger of confounding the rights of the person who is in fact in possession with the rights of the person who has a right to possession, either absolute, or subject only to the performance of a condition, *i.e.* (in the case that we have last mentioned), that of demanding possession.

"Possession," in its legal meaning, is used for—

(1.) *De facto* possession;

(2.) Possession in law.

Possession *de facto*.

"*De facto*" (or "actual") possession means effective occupation or control, manifested by some outward act. What amounts to *de facto* possession depends upon the nature and position of the thing possessed, and the intention with which the act was done. The acts by which I manifest the possession of the coat that I am wearing are of a very different nature from those by which I manifest my possession of a seat in my garden. *Primâ facie*, the act of wearing the coat is a strong manifestation of my possession; but, if I went to a vendor of ready-made clothes and tried on a coat to see whether it fitted me, the circumstances would show that the act of wearing the coat was not intended to manifest my possession of it.

The possession of land carries with it, in general, possession of everything attached to or upon or under that land, and, in the absence of a better title in another, the right to possess it.[3]

A common case, in which the circumstances show that an outward act is not intended to amount to a claim to possession, is

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[1] *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515; *Lyell* v. *Kennedy*, 18 Q. B. D. 796.

[2] Pollock and Wright on Possession, 1.

[3] *S. Stafford Co.* v. *Sharman*, [1896] 2 Q. B. 44.

where the person apparently having *de facto* possession holds, and admits that he holds, that possession for some other person, as where a servant holds it for his master,[1] or where a bailiff holds property taken under a distress.[2] In a case of this nature the word "custody" is sometimes used instead of "possession." We speak of a servant having "custody" of the things placed in his charge by his master, and of goods seized under the distress as being in the "custody" of the law.

Possession in law.

Possession in law is—

(1.) Where a person has the *de facto* possession and no other person has or can without his consent acquire the right to the possession. This includes the common case of the owner being in possession.

(2.) Where a person has the *de facto* possession, and has the manifest intention of excluding every other person from the *de facto* possession, notwithstanding that another person has the right to the possession. This is the case where a thief is in possession of a thing that he has stolen. He manifestly intends to exclude every other person from possession; yet the owner has the right to the possession.

(3.) Where a person has the *de facto* possession with the consent of the owner. This is the case where a man has hired or borrowed a chattel, where it is pledged to him, where he takes care of it or undertakes to carry it for the true owner.

(4.) Where a person who has had legal possession in any of the cases above mentioned has lost the thing, or has ceased to exercise any effective control, and no other person has acquired *de facto* possession. This is the case, for example, where a man has lost a ring in his house, or where the owner of a quarry ceases to work it, and leaves his tools in the quarry.

It should be observed that a person who has *de facto* possession has possession in law as against all the world except the person or persons, if any, who has or have a better right to the possession.

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[1] Per Hardwicke, C., *Ward* v. *Turner*, 2 Ves. sen. 438.

[2] As to the difference between goods taken in execution and under a distress, see Pollock and Wright, 82.

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Right to possess.

The "right to possess," or to have legal possession, is one of the rights exercisable by the owner of the thing, unless he has parted with it. It is often confounded with ownership itself, and still more often with possession.

The right may co-exist with *de facto* possession, as where the owner has *de facto* possession; or it may be separated from the *de facto* possession. In the latter case it is sometimes called "constructive" possession; but the phrase is properly confined to those cases where the person entitled to the right has, or had, the same remedies as if he had been really in possession.[1]

Where possession, in fact, is undetermined, possession in law follows the right to possess.[2] For instance, furniture which is in a house occupied by husband and wife is in the possession of that one who has the legal title thereto.[3]

Owner out of possession.

We have to consider the cases where the owner has not the *de facto* possession. There are two classes of cases:—

First. Where he has the right to possess.

Secondly. Where he has not the right to possess. In this case he may be able, or he may not be able, to acquire the right to possess on demanding possession from the possessor. In cases of this nature the owner is called the bailor and the possessor is called the bailee.[4]

Cases of the first class occur where the goods are lost, or taken by a wrong doer. The finder or person who takes them has the right to possess against all the world except the true owner; but the latter retains his right to possess against all the world, including the *de facto* possessor.[5]

Bailments.

In cases of the second class, or bailments, both the *de facto* possession and the right to possess are in the bailee. Bailment has been defined as a delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered. The bailor has a right to the redelivery of the very thing bailed, so that, where the contract is that another thing, even if it be of the same quality and value, is

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[1] Pollock and Wright, 27.

[2] *Ib.* 24.

[3] *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18.

[4] See *post*, Chap. II. on Bailments.

[5] *Armory* v. *Delamirie*, 1 Sm. L. C. 343.

to be given to the person who delivered the property, the contract is not one of bailment.[1]

Change of possession.

The transfer of the possession of goods may be voluntary, in which case it is effected by a process which is called "delivery" by the transferor, and "acceptance and receipt"[2] by the transferee; or it may be involuntary, in which case the process is called dispossession or "ouster" of the person deprived of possession, and "occupation" or "taking" by the person who acquires possession, as where a chattel is stolen or lost.

"Delivery."

Delivery of a movable object is effected by handing it to the transferee with the intent to transfer the possession. But the thing may be handed over with the intention to confer an authority to use it in a specified manner only; as where a host hands a chair to a guest; in this case the act of the possessor does not amount to delivery.

Bulky objects.

Bulky objects or masses of goods cannot readily be handed over; but the possession of them is transferred by any act which puts them under the effective control of the person to whom possession is to be given.[3]

The delivery of the key of a box or warehouse in which the goods are stored is an ambiguous act. It may be intended to enable the person to whom the key is given to deal with the goods in a specified manner, as where the key is given to a servant to enable him to take out something for his master's use. In this case there is no transfer of possession. But where the delivery of the key confers an effective control for all purposes on the person to whom it is handed, it operates as a transfer of the possession of the goods. If the key is given to a person who has the right to possess the goods, it operates as a transfer of the possession.

"Symbolic delivery."

In cases of this nature the delivery of the key is sometimes called "symbolic," or "constructive" delivery.[4] But it is more than this; for, if the person to whom the key is delivered retains it, and if it is the only key, or the only key intended to be used, the effect of the delivery of the key is to give to the

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[1] *South Australian Insurance Co.* v. *Randell*, L. R. 3 P. C. 101.

[2] See *post*, p. 52.

[3] *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582. See *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18.

[4] Per Willes, J., *Meyerstein* v. *Barber*, L. R. 2 C. P. 52; and per Mellish, L. J., *Ancona* v. *Rogers*, 1 Ex. D. 285.

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person to whom it is given the exclusive control, or *de facto* possession, of the goods; if he chooses to lock the door, no other person can rightfully deal with them without his permission.[1] On the other hand, if it be given to him as the servant of the owner for some temporary purpose, he has no right to exclude the owner; or, if it be given to him for his own use, and another key be retained by the owner with the intention of obtaining access to the goods, the person to whom the key is delivered does not acquire the exclusive control or *de facto* possession of the goods. Therefore, the question, whether the delivery of the key operates as transfer of the possession of the goods depends upon the circumstances of the case. Lord Hardwicke says, "Delivery of the key of bulky goods has been allowed as delivery of the possession, because it is a way of coming at the possession or to make use of the thing, and therefore the key is not a symbol, which would not do."[2]

Sir F. Pollock, commenting on these cases, says:—[3]

> "On the whole, we have indeed the authority of Willes, J., and Mellish, L. J., for speaking of delivery by a warehouse-key or the like as a symbolic delivery; but there is no real contradiction between this and what Lord Hardwicke said, 'the key is not a symbol, which would not do.' The key is not a symbol in the sense of representing the goods, but the delivery of the key gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which being by manual act, instead of word, may be called symbolic) that the transferor intends no longer to meddle with the goods. It therefore excludes doubt as to the intent and effect of other acts which standing alone might be ambiguous."

Confusion between "possession" and "right to possess."

In many of the reported cases and text-books there is a little confusion of language against which the student must be on his guard.

First. A person who has the immediate right to possess is often said to have possession. Possibly the reason for this is that the same action, viz., trespass, could formerly be brought against a person who interfered either with the possession or with the immediate right to possess.

"Qualified ownership."

Secondly. A bailee (who, it will be remembered, has both the possession and the right to possess) is sometimes said to have a

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[1] *Ward* v. *Turner*, 1 Dick. 170; 2 Ves. sen. 443; 1 W. & T. L. C. 390; *Hilton* v. *Tucker*, 39 Ch. D. 669; *Gough* v. *Everard*, 2 H. & C. 1.

[2] *Ward* v. *Turner*, *sup.* [3] Pollock and Wright, 68.

"qualified ownership," or "special property," in the goods bailed, while the bailor is said to retain the "general" ownership or "general property."[1]

The explanation appears to be that the bailee can exercise all those rights which are annexed by law to the possession, except so far as he may have been precluded from exercising them by the nature of the bailment or by express contract. He may also exercise other rights depending on the nature of the bailment. The rights thus exercisable by the bailee, being indefinite in number, are properly called "ownership" or "property."

Property consists of a bundle of rights.

The student who has grasped the meaning of possession will have but little difficulty in understanding the juridical doctrine that "property consists of a bundle of rights."[2]

The person in actual possession of a thing has the physical power to act with respect to it in any manner that he thinks fit, the manners in which he can so act being indefinite in number.

Some of the possible acts are prohibited by law; but there remain an indefinite number of acts, all of which the person in possession has the right to perform.

The possible acts may be classified as follows:—

(1) Acts prohibited by law.

(2) Acts that may be lawfully done by the owner in possession. These are indefinite in number, and the rights to do them are sometimes called rights *in rem*, which may be exercised as against all the world.

Where the owner has parted with the possession of a thing, he can no longer exercise all these rights. Hence the rights *in rem* may be sub-divided as follows:—

(1) Rights that can be exercised by the possessor, which, being indefinite in number, amount to the "special property" in the thing.

(2) Rights that can be exercised by the owner out of possession, which, being indefinite in number, amount to the "general property" in the thing.

Rights *in personam*.

Where one man has a right against another defined person, as distinguished from the case in which he has rights against all the world, his right is said to be a right *in personam*. An example is a debt. But as the owner of this right can deal with it in an

[1] Co. Litt. 145 *b*; Plowd. 542. See *post*, p. 22.

[2] See Campbell on Sale, 38.

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indefinite number of modes as regards third persons, he is said to be owner of or to have property in the debt. For example, though the sole right of a creditor as against his debtor is to be paid, *i.e.*, a right *in personam*, he can, as against all the world, sell, mortgage, or release the debt; and these rights are considered to be rights *in rem*, although the *res* has no physical existence.

Actions of Trespass, Trover, Detinue.

In order to understand the reported cases on possession and the right to possess, it is absolutely necessary that the student should have some knowledge of the forms of action which were in use before the Judicature Act came into operation.

Trespass.

Trespass was an action that could be brought only by a person having actual possession, or, if he had not actual possession, having the immediate right to possess;[1] but, as against a mere wrongdoer, it was immaterial whether the actual possessor had the right to possess.[2] The action could be brought in respect of either land or goods. All that the plaintiff had to prove was that he was in actual possession, or that he had the immediate right to possess, at the time when the wrongful act was done; and, if the plaintiff was in actual possession, the defendant could not successfully defend himself by showing that a third person had the right to possess,[3] unless that person intervened.[4]

Jus tertii.

Where the injury done by the wrongdoer was an injury to the right to possess, the actions were ejectment for land, trover for goods. As actual possession confers a right to possess against a mere wrongdoer, it followed that where a person was in actual possession and his actual possession was disturbed by the act complained of, so that he might have brought trespass, he might, instead of so doing, bring an action of ejectment or trover, as the case required. The action of trover was in form an action on the case for damages to the plaintiff, who alleged that the defendant had *found* the goods and converted them to his own use, the finding being by a fiction deemed to give lawful possession. Hence the action is called "trover and conversion," and the gist

Trover. Ejectment.

Conversion.

[1] "A lessor at will or a bailor, where the bailment is not for a term or coupled with an interest, could always maintain trespass against a wrongdoer as well as the lessee or bailee"; Pollock and Wright, 93. A trustee can bring trespass though goods are in the possession of *cestui que trust*; *White* v. *Morris*, 11 C. B. 1015.

[2] *Catteris* v. *Cowper*, 4 Taunt. 547; 13 R. R. 682; *Harper* v. *Charlesworth*, 4 B. & C. 574; 28 R. R. 405.

[3] *Graham* v. *Peat*, 1 East, 244; 6 R. R. 268; per Ld. Cairns, C., *Bristow* v. *Cormican*, 3 App. Cas. 651.

[4] Per Romer, J., *Barker* v. *Furlong*, [1891] 2 Ch. 181.

of it is the conversion or depriving the plaintiff of the use and possession of the goods.[1] Where the wrong was done to the actual possession, the defendant could not defend himself by showing that the right to possess was in a third person;[2] but where the wrong was done to an alleged right to possess, such a defence was effectual.[3]

Jus tertii.

Examples. A. is in possession of a house; B. comes and takes possession. This is a wrong done to the actual possession, and therefore A. could bring either trespass or ejectment against B., and B. could not defend himself by showing that the house belonged to C.[4]

A. is in possession of a house. B., alleging that he has the right to possess it, so that the possession of A. is an injury to his alleged right to possess, brings ejectment against A. A. can successfully defend himself by showing that the house belongs to C.

A. is in possession of goods. B. takes them out of his possession; A. brings trover; B. proves that the goods belong to C.; this is no defence.[2]

A. bought goods from B. and allowed him to remain in possession. B. became bankrupt. As the goods were in his possession with the consent of the true owner, the ownership and the right to possess passed to his assignees in bankruptcy. The sheriff seized under a *fi. fa.* A. brought trover against the sheriff, and it was held that the sheriff might defend himself by setting up the right of the assignees who claimed the goods.[5]

Detinue.

Detinue was an action by a person who had the right to immediate possession[6] against a person who had lawfully come into possession of goods for unlawfully detaining them. But the plaintiff was not bound to show the circumstances under which the goods came into the defendant's possession.[7] The judgment was originally that the plaintiff should recover the goods or their value. The Court may now order the defendant to deliver up the goods without the option of keeping them and paying their value. And a writ of delivery may be issued under which the sheriff will

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[1] See *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495; *Gordon* v. *Harper*, 7 T. R. 9; 4 R. R. 369. See as to this action, 3 Bl. 152; Pollock on Torts, 316; Campbell on Sale, 53; and notes to *Wilbraham* v. *Snow*, 2 Wms. Saund. 47.

[2] *Armory* v. *Delamirie*, 1 Sm. L. C. 343.

[3] *Leake* v. *Loveday*, 4 M. & Gr. 972.

[4] *Davison* v. *Gent*, 1 H. & N. 744.

[5] *Leake* v. *Loveday*, 4 M. & Gr. 972.

[6] *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202.

[7] *Gledstane* v. *Hewitt*, 1 Cr. & J. 565.

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distrain the defendant by all his lands and chattels until he delivers the property, or a writ of assistance may be issued under which the sheriff will put the plaintiff in possession of the property.[1]

A. hires furniture from B. and obtains possession of it. At the end of the term for which it is hired, A. declines to give the furniture back to B. In this case A. came lawfully into possession of the furniture; the injury done to B. is the detention, and the action of detinue was the appropriate form of action to enable B. to recover possession of the furniture.

The fundamental difference[2] between real estate and chattels real on the one hand and personal chattels on the other, appears distinctly from the consideration of these actions. A person entitled to possess property of the former class could, by bringing an action of ejectment, obtaining judgment, and suing out execution on that judgment, obtain actual possession of the land. On the other hand, if the action was that of detinue, the only action to recover possession of a specific chattel, and the defendant declined to give it up, there was formerly no mode in which the plaintiff could obtain possession of the chattel.[3]

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[1] R. S. C. Ord. XLVIII.; *Wyman* v. *Knight*, 39 Ch. D. 165; *Winfield* v. *Boothroyd*, 34 W. R. 501. See *Peruvian Co.* v. *Dreyfus*, [1892] A. C. 176; *Ex p. Drake*, 5 Ch. D. 866.

[2] M. L. R. P. 7.

[3] See M. L. R. P. 7, note (*c*).

CHAPTER II.

BAILMENTS—POSSESSORY LIEN.

Bailments.

A BAILMENT has been defined to be[1] "a delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered." In this definition the "bailor" is the person who delivers the goods to the "bailee." Definition of bailment.

A bailment must be distinguished from an alienation of the property with a proviso for repurchase, and from an alienation of the property upon trust.

Holt, C.J., in his celebrated judgment in *Coggs* v. *Bernard*,[2] divided bailments into six classes, viz., (1) *Depositum*, which is "a bare naked bailment of goods delivered by one man to another to keep for the use of the bailor" [without reward]; (2) *Commodatum*, "when goods or chattels that are useful are lent to a friend *gratis*, to be used by him"; (3) *Locatio et Conductio*, "when goods are left with the bailee to be used by him for hire"; (4) *Pawn* or *Pledge*, "when goods or chattels are delivered to another to be a security to him for money borrowed of him by the bailor"; (5) "when goods or chattels are delivered to be carried, or something is to be done about them, for a reward"; and (6) "when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them, *gratis*, without any reward for such his work or carriage." Classes of bailments.

Again, bailments may be classified according as they are for the benefit of (α) the bailor only, as in the case of a deposit without reward; or (β) for the benefit of the bailee only, as in the case of goods lent gratuitously; or (γ) for the benefit of both

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[1] Jones on Bailments, p. 1; Story on Bailments, p. 2.

[2] 2 Ld. Raym. 909; 1 Sm. L. C. 167.

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bailor and bailee, as in the cases of the hiring of a thing for use, or of a delivery of goods to a bailee who, for a reward, is to carry them, or otherwise bestow care or labour upon them. This class includes bailments to pawnbrokers, innkeepers, and carriers.

Bailee has exclusive control.

The delivery must be made for the purpose of giving the exclusive control of the goods.[1] In ordinary cases a man does not create a bailment by putting the goods in the charge or custody of his servant, nor by delivering them to[2] a person to be used in his presence or in his house, though the mere fact that they are not to be carried away from the house does not prevent the transaction from being a bailment.

The delivery need not be made by the bailor himself. Thus, A. may sell goods to B. and, with B.'s consent, deliver them to a warehouseman to hold as a bailee for B.

By change of character of possession.

A bailment may arise from a mere change in the character of the possession, without any change in the possession itself. Thus, A., being in possession of the goods, either as owner or as bailee for B., may (in the latter case with B.'s consent) agree with C. to hold them as his bailee. This is called "bailment by attornment."[3]

Taking with consent of owner.

A person who takes a thing with the consent of the owner becomes his bailee.[4]

"Qualified" ownership or "special property."

The bailee has always possession of the goods and the right to possess, though his right to possess may be determinable at any instant at the will of the bailor, or otherwise in accordance with the terms of the bailment. The bailee may lawfully exercise over the goods all the rights which are annexed by law to the possession, except so far as he may be precluded from exercising them by the nature of the bailment or by express contract. He has an insurable interest,[5] and he may sue for injury to or interference with the goods, and recover such damages as he has suffered.[6] It has, however, been held that he cannot recover from a person who injures the goods the amount of such injury, as damages, when he

[1] See *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92.

[2] Pollock and Wright on Possession, 138, 160; 3 Inst. 108; *Chisser's Case*, T. Raym. 275.

[3] *Gosling* v. *Birnie*, 7 Bing. 339; 33 R. R. 497; *Holl* v. *Griffin*, 10 *Id.* 246; *Woodley* v. *Coventry*, 2 H. & C. 164; *Stonard* v. *Dunkin*, 2 Camp. 344; 11 R. R. 724; *Crawshay* v. *Thornton*, 2 My. & Cr. 1; *Mills* v. *Charlesworth*, 25 Q. B. D. 421, 425.

[4] Pollock and Wright on Possession, 163.

[5] *Waters* v. *Monarch, &c. Co.*, 5 E. & B. 870.

[6] *Claridge* v. *S. Stafford Tram. Co.*, [1892] 1 Q. B. 422.

himself is not liable therefor to the bailor.[1] The bailee is said to have a "special property," or "qualified ownership," in the goods, while the bailor is said to have the "general property" or "general ownership."[2]

Bailment without contract.

There may be a complete bailment without any contract express or implied, as where the bailee is an infant;[3] or, in cases not falling within the Married Women's Property Act, 1882, where the bailee is a married woman.[4]

Identical goods.

Unless the identical goods, either in the original or an altered form, are to be applied or returned, the transaction is not a bailment;[5] as, for instance, where coin is paid to a man and he is not to apply or return it in specie.[6] On the other hand, if the identical coins are to be applied or paid, as where they are special foreign coins,[7] or are enclosed in a bag or letter, the transaction is a bailment.[8]

Bailee may not have to restore goods —auctioneer —pledgee.

But a bailment may exist although it may be the duty or right of the bailee to sell the goods, as in the case of an auctioneer[9] or pledgee, in either of which cases, if a sale is made, it is impossible for the bailee to restore the goods to the bailor. It may even exist where, on the happening of certain events, the general property in the goods will be transferred to the bailee, so that he will not have to restore them to the bailor. Thus, where an abstract of the title of real estate is delivered to a person who has contracted to purchase it, if the purchase goes off, he must restore the abstract to the vendor; if the purchase is completed, he has the right to retain it.[10] So, in the case of goods let under a hire and purchase agreement, under which, if default is made in payment of rent or instalments, the original owner has the right to require the hirer to return the goods hired, but, if no default is made, they become, at the expiration of the stipulated term or on

[1] *Claridge* v. *S. Stafford Tram. Co.*, *sup.*; see *Meux* v. *G. E. R.*, [1895] 2 Q. B. 387, 394. In America the contrary has been held: *Woodman* v. *Nottingham*, 49 New Hampshire R. 387. See Sedgwick's Leading Cases on Measure of Damages, 685.

[2] Co. Litt. 145 *b*; Plowd. 524; Campbell on Sale, 39; *ante*, p. 16.

[3] *The Queen* v. *McDonald*, 15 Q. B. D. 323.

[4] *R.* v. *Robson*, 9 Cox, 29.

[5] *South Australian, &c. Co.* v. *Randell*, L. R. 3 P. C. 101.

[6] *Pott* v. *Clegg*, 16 M. & W. 321; *Tassell* v. *Cooper*, 9 C. B. 509.

[7] *Bretton* v. *Barnet*, Ow. 86.

[8] See the cases collected, Pollock and Wright on Possession, 161.

[9] See *Williams* v. *Millington*, 1 H. Bl. 84; 2 R. R. 724; *Barker* v. *Furlong*, [1891] 2 Ch. 172; *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495.

[10] *Roberts* v. *Wyatt*, 2 Taunt. 268; 11 R. R. 566.

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payment of the stipulated amount of hire, the absolute property of the hirer.[1]

Re-delivery to bailor for special purpose.

The bailee may re-deliver the goods to the bailor for a special purpose without determining the bailment. In a case of this nature it may perhaps be considered that the bailee retains possession of the goods, and that they are merely placed in the custody of the bailor as servant of the bailee; and the possession of the bailee is, perhaps improperly, said to be constructive.

A good example of this is afforded by the case of *Reeves* v. *Capper*,[2] where Wilson pledged his chronometer to Capper upon the terms that Wilson was to have the use of it during a voyage. Wilson delivered the chronometer to Capper's clerk, who re-delivered it to Wilson, who took it on his voyage. It was held that the delivery by Capper's clerk to Wilson was not a parting with the possession by Capper, but that Wilson's possession was the possession of Capper, and that Wilson had merely a licence to use the chronometer as Capper's servant.

Return of goods without re-delivery.

The bailee may do that which amounts to returning the goods to the bailor without making an actual re-delivery to the bailor, by delivering the goods, with the consent of the bailor, to a stranger who consents to hold them as the bailee of the original bailor. This is called bailment by "attornment."[3]

Several bailors.

Where there are several bailors, the bailee is not bound to re-deliver the goods to some or one only of them, without the consent of the others.[4] Where one of several tenants in common had the custody of goods for all, he could not bring trover against one of the co-owners who took the goods out of his custody.[5]

Determination of bailment by act of bailee.

"The act of the bailee in doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel, is a determination of the bailment, and causes the possessory title (*i.e.*, the right to possess) to revert to the bailor."[6] This rule has been applied where a bailee for hire sold the goods;[7] where a mortgagor of goods sold them;[8] where a man

[1] See *Re Blanshard*, 8 Ch. D. 601; *Ex p. Crawcour*, 9 Ch. D. 419; *Helby* v. *Matthews*, [1895] A. C. 471, *post*, p. 48.

[2] 5 Bing. N. C. 136. See also *Roberts* v. *Wyatt*, *sup.*; *North Western Bank* v. *Poynter*, [1895] A. C. 56.

[3] *Godts* v. *Rose*, 17 C. B. 229.

[4] *Harper* v. *Godsell*, L. R. 5 Q. B. 422; *May* v. *Harvey*, 13 East, 197; 12 R. R. 322.

[5] *Holliday* v. *Camsell*, 1 T. R. 658; 1 R. R. 346.

[6] Per Parke, B., *Fenn* v. *Bittleston*, 7 Ex. 159; see also *Donald* v. *Suckling*, L. R. 1 Q. B. 585, 614.

[7] *Cooper* v. *Willomatt*, 1 C. B. 672; *Marner* v. *Bankes*, 16 W. R. 62; *Bryant* v. *Wardell*, 2 Ex. 479.

[8] *Fenn* v. *Bittleston*, 7 Ex. 152.

to whom oxen were lent to plough land killed them;[1] and where a warehouseman[2] or carrier[3] delivered the goods to a wrong person; but if a *pledgee* deals with the pledge in a manner other than is allowed by law for the payment of his debt, the immediate right to possession does not re-vest in the pledgor.[4]

Bailee may not dispute title of bailor.

As a general rule, the bailee is not allowed to dispute the title of his bailor. He is bound to restore the goods on the performance of the condition on which the bailment is made, notwithstanding that he knows that a third person has or claims to have a better title to the goods than the bailor.[5] On the other hand, the bailee cannot have a better title to the goods than his bailor,[6] and therefore he can successfully resist the claim of the bailor to have the goods delivered to him, by showing that in refusing to give them up he is acting at the request and with the authority of a person who has a better title than the bailor;[7] or by showing that such a person has actually taken the goods from him contrary to his wish;[8] but he cannot set up the title of another if he accepted the goods with knowledge of the adverse claim;[9] and if the bailee has *attorned*[10] to an innocent purchaser of the goods, he is estopped from denying the title of the purchaser.[11]

Jus tertii.

In the case of common carriers.

The position of a common carrier[12] is somewhat peculiar. He is bound to receive goods for carriage, and is unable to make any enquiry as to the ownership. If goods are delivered to a carrier by a pseudo-owner, the carrier is safe if he delivers the goods in pursuance of his directions without any knowledge of the true owner's claim. In like manner he is safe, as against the pseudo-owner from whom he could not refuse to accept the goods, if the true owner claims the goods and he gives them up to him.[13]

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[1] Lit. s. 71.

[2] *Devereux* v. *Barclay*, 2 B. & Ald. 702; 21 R. R. 457.

[3] *Youl* v. *Harbottle*, Peake, 49; *Stephenson* v. *Harte*, 4 Bing. 476; 29 R. R. 602.

[4] *Halliday* v. *Holgate*, L. R. 3 Ex. 299; *Yungmann* v. *Briesemann*, 67 L. T. 642.

[5] *Biddle* v. *Bond*, 6 B. & S. 225; *Betteley* v. *Reed*, 4 Q. B. 511; *Rogers* v. *Lambert*, [1891] 1 Q. B. 318.

[6] *Wilson* v. *Anderton*, 1 B. & Ad. 456; 35 R. R. 348.

[7] *Thorne* v. *Tilbury*, 3 H. & N. 534; *Ogle* v. *Atkinson*, 5 Taunt. 759; 15 R. R. 647; *Rogers* v. *Lambert*, *sup.*

[8] *Shelbury* v. *Scotsford*, Yelv. 23; *Ross* v. *Edwards*, 73 L. T. 100.

[9] *Ex parte Davies*, 19 Ch. D. 86.

[10] *Ante*, p. 22.

[11] *Henderson* v. *Williams*, [1895] 1 Q. B. 521.

[12] See *post*, p. 29.

[13] *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 649.

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The bailee may become liable to the true owner if he declines to give up the goods to him.[1]

In the case of conflicting claims by the bailor and a third person, the bailee may institute interpleader proceedings.[2]

Duty of bailee in cases where the bailment is—

The bailee is bound to take care of the goods bailed, and is responsible if they are lost or damaged through his negligence. The amount of negligence which renders him responsible depends upon the nature of the bailment.

for benefit of bailor only;

First: Where the bailment is entirely for the benefit of the bailor, as where goods are delivered to the bailee to be kept by him gratuitously (the *depositum* of the Roman law), or to be carried or worked on by him gratuitously (the *mandatum* of the Roman law), he is, in the absence of special contract, only bound to act in good faith, and is only liable for gross negligence.[3]

The question what amounts to gross negligence in any particular case is a question for the jury. Generally speaking, the fact that the gratuitous bailee has taken the same amount of care of goods deposited with him that he takes of his own property affords a strong, though not a conclusive, presumption that he has not been guilty of gross negligence.[4]

Where the gratuitous bailee undertakes to carry, or to do something to the goods bailed, he is bound to use such skill as he has in fact, and is guilty of gross negligence if he does not.[5] In this case, if he undertakes to do that something to the best of his skill, and his situation or profession is such as to imply skill, an omission to use that skill is gross negligence.[6]

for benefit of bailee only;

Secondly: Where the bailment is solely for the benefit of the bailee, as in the case of a gratuitous loan of chattels to be used by the bailee (the *commodatum* of the civilians). In this case the bailee is bound to use great diligence in the protection of the chattels, and will be liable even for slight negligence.

Slight negligence is the omission of that amount of care that

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[1] *Batut* v. *Hartley*, L. R. 7 Q. B. 594.

[2] *Attenborough* v. *St. Katharine's Dock Co.*, 3 C. P. D. 450; *Robinson* v. *Jenkins*, 24 Q. B. D. 275; *Rogers* v. *Lambert*, [1891] 1 Q. B. 318, 327; R. S. C. Ord. LVII.

[3] *Coggs* v. *Bernard*, 2 Ld. Raym. 913; 1 Sm. L. C. 167; *Doorman* v. *Jenkins*, 2 A. & E. 256; *Shiells* v. *Blackburne*, 1 H. Bl. 158; 2 R. R. 750; *Dartnall* v. *Howard*, 4 B. & C. 345.

[4] *Giblin* v. *McMullen*, L. R. 2 P. C. 339. See per Sir Wm. Scott (Ld. Stowell), *The William*, 6 Rob. 316.

[5] *Lord* v. *Midland R. Co.*, L. R. 2 C. P. 344, per Willes, J.; *Wilson* v. *Brett*, 11 M. & W. 113.

[6] *Shiells* v. *Blackburne*, 1 H. Bl. 158; 2 R. R. 750.

very attentive and vigilant persons take of their own goods.[1] The bailee must be considered as having held himself out to the lender as being competent to take care of the thing lent.[2] A borrower is only allowed to use the thing lent in accordance with the conditions of the loan.[3] If the goods have been injured or destroyed by a stranger without any negligence on his part, he is not liable to the bailor.[4]

for common benefit of bailee and bailor.

Thirdly: When the bailment is for the common benefit of both bailor and bailee, as in cases of pawn, hire, warehousing for hire, and in other cases where the bailee undertakes for reward to do work upon or to carry the goods. In all these cases, except where the goods are delivered to a common carrier, the bailee is bound (in the absence of special contract) to use ordinary care, and is liable for ordinary negligence. By "ordinary care" is meant that care which every prudent man takes of his own goods.[5] The bailee will be liable if the goods are injured through the negligence of his servant even while using them in breach of his duty to his master.[6]

The questions that arise as to pawn and common carriers require special consideration.

Pawn or pledge.

A pledge or pawn (*pignus* of the civilians) is where possession of a personal chattel is delivered by one person, called the pawnor or pledgor, to another, called the pawnee or pledgee, as security for a debt. The pawnee, having both the possession and the right to possess, is said to have a "special property" in the chattel,[7] the general property remaining in the pawnor.

But, on tender or repayment, the right to possess is immediately re-vested in the pawnor. It need hardly be said that the pawnee does not acquire any greater right to the chattel than that which

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[1] *Coggs* v. *Bernard*, 2 Ld. Raym. 909; 1 Sm. L. C. 167; Bracton, lib. 3, c. 2, s. 1.

[2] Per Parke, B., *Wilson* v. *Brett*, 11 M. & W. 115.

[3] *Bringloe* v. *Morrice*, 1 Mod. 210.

[4] *Claridge* v. *S. Stafford Trams*, [1892] 1 Q. B. 422.

[5] *Coggs* v. *Bernard*, 1 Sm. L. C. 167; 2 Ld. Raym. 909; (hiring) *Dean* v. *Keate*, 3 Camp. 4; 13 R. R. 735; *Longman* v. *Calini*, Abb. Ship. 270, n.; (warehousing) *Walker* v. *British, &c. Assoc.*, 18 Q. B. 277; *Cailiff* v. *Danvers*, Peake, 114; 3 R. R. 666; *Brabant* v. *King*, [1895] A. C. 632; *Peers* v. *Sampson*, 4 D. & R. 636; (livery stable keeper) *Searle* v. *Laverick*, L. R. 9 Q. B. 122; (work for hire) *Clarke* v. *Earnshaw*, Gow, 30; 21 R. R. 790.

[6] *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413.

[7] See Campbell on Sale, 57; *Donald* v. *Suckling*, L. R. 1 Q. B. 604; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; *Burdick* v. *Sewell*, 10 Q. B. D. 363, 367; *Re Morritt*, 18 *Id.* 222.

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the pawnor had.[1] There are some exceptions to this rule contained in the Factors Act, 1889,[2] and the Sale of Goods Act, 1893,[3] in favour of pledges by factors,[4] by persons who sell goods and remain in possession of them, and by persons who have bought or agreed to buy goods, and have obtained possession thereof with the consent of the seller.

The pawnee has a right to sell the goods on non-payment of the debt when a day was fixed for payment,[5] but only after notice, if no day was fixed.[6] He may repay himself out of the proceeds, but must pay to the pawnor the net surplus of the purchase-money after payment of all expenses.

The pawnee's interest in the pawn is alienable, and may be sub-pledged[7] and be seized in execution by the sheriff.[8]

A pawn or pledge is not within the Bills of Sale Acts,[9] although accompanied by a contemporaneous document signed by the pawnor or pledgor recording the transaction, and regulating the rights of the pawnee or pledgee as to the sale of the goods.[10]

Pawnbrokers Act, 1872.

Many statutory provisions have been made with regard to pawnbrokers or persons who carry on the business of lending money on goods taken in pawn, beginning with 1 Jac. 1, c. 21; but these have all been superseded by the Pawnbrokers Act, 1872.[11] The Act applies (1) to every loan by a pawnbroker of forty shillings or under, and (2) to every loan by a pawnbroker of above forty shillings and not above ten pounds, except in the case of a special contract as authorized by the Act between the pawnor and pawnbroker at the time of the pawning.[12] The Act contains general regulations for the carrying on of the business, which provide that on taking a pledge the pawnbroker shall deliver a pawn ticket to the pawnor, and includes a scale of profits and charges. Every pledge is redeemable by the holder for the time

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[1] *Hooper* v. *Ramsbottom*, 4 Camp. 121; *Lamb* v. *Attenborough*, 1 B. & S. 831; *Hoare* v. *Parker*, 2 T. R. 376; 1 R. R. 500.

[2] 52 & 53 Vict. c. 45, ss. 2—9. See *Hastings* v. *Pearson*, [1893] 1 Q. B. 62; *Tremoille* v. *Christie*, 69 L. T. 338.

[3] 56 & 57 Vict. c. 71, s. 25. See *Helby* v. *Matthews*, [1895] A. C. 471; *Nicholson* v. *Harper*, [1895] 2 Ch. 415.

[4] See as to Factors, *post*, p. 76.

[5] *Capper* v. *Dickinson*, 1 Rolle Rep. 181.

[6] *Ex p. Hubbard*, 17 Q. B. D. 690, 698; *Re Morritt*, 18 Q. B. D. 222.

[7] *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Mores* v. *Conham*, Ow. 123; *Portalis* v. *Tetley*, 5 Eq. 140.

[8] *Re Rollason*, 34 Ch. D. 495. See *post*, p. 298.

[9] See *post*, Chap. VII., p. 93.

[10] *Ex p. Hubbard*, *sup.*

[11] 35 & 36 Vict. c. 93.

[12] *Ib.* ss. 10, 24.

being of the pawn ticket[1] within twelve months from the day of pawning and seven days of grace.[2] The provisions of sect. 25 do not, however, affect the common law rights of the owner of property which has been pledged without his authority.[3] If a pledge for ten shillings or under has not been redeemed within the time, it becomes the pawnbroker's absolute property;[4] but a pledge for above ten shillings remains redeemable until disposed of,[5] and such disposition must be by sale by auction as prescribed by the Act,[6] the holder of the ticket being entitled to any surplus if claimed within three years of the sale.[7] The pawnor is protected against loss by fire, or by depreciation in value of the pledge through the pawnbroker's default.[8]

Common carriers.

A common carrier is one who offers to carry goods for any one who brings them, between certain *termini*, and by a certain route. The owner of a ship, plying between certain ports and carrying the goods of all comers as a general ship, as distinguished from a ship hired to carry a specific cargo, is a common carrier.[9]

A common carrier insures the goods against all loss except that arising from the act of God[10] or the public enemy, or from a defect in the thing itself.[11] His duty to carry the goods safely does not depend on contract, but is a liability thrown on him by law.[12] In the absence of express contract, he is bound to go by the accustomed route and to deliver within a reasonable time,[13] and his liability is the same whether he carries by land or water.[14]

A carrier may limit his liability by an express contract, which, in the case of a ship, is usually contained in the bill of lading.[15]

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[1] 35 & 36 Vict. c. 93, s. 25.

[2] *Ib.* s. 16.

[3] *Singer Co.* v. *Clark*, 5 Ex. D. 37. See *Cheesman* v. *Exall*, 6 Ex. 341.

[4] 35 & 36 Vict. c. 93, s. 17.

[5] *Ib.* s. 18.

[6] *Ib.* s. 19.

[7] *Ib.* s. 22.

[8] *Ib.* ss. 27, 28.

[9] *Nugent* v. *Smith*, 1 C. P. D. 427.

[10] As to the meaning of the "act of God," see *Nugent* v. *Smith*, *sup.*; *Nichols* v. *Marsland*, L. R. 10 Ex. 255; 2 Ex. D. 1; *Nitrophosphate Co.* v. *London and St. Kath. Docks Co.*, 9 Ch. D. 503. See the notes to *Walton* v. *Waterhouse*, 2 Wms. Saund. 420; and Pollock on Contract, 396.

[11] Co. Litt. 89*a*; 22 Lib. Assis. pl. 41; *Nugent* v. *Smith*, 1 C. P. D. 423; *Blower* v. *G. W. R. Co.*, L. R. 7 C. P. 655 (animals); *Kendal* v. *L. & S. W. R. Co.*, L. R. 7 Ex. 373 (animals).

[12] *Pozzi* v. *Shipton*, 8 A. & E. 963.

[13] *Hales* v. *L. & N. W. R. Co.*, 4 B. & S. 66; *Taylor* v. *G. N. R. Co.*, L. R. 1 C. P. 385.

[14] *Rich* v. *Kneeland*, Cro. Jac. 330; Hob. 17; 2 Lev. 69; *Nugent* v. *Smith*, 1 C. P. D. 423. The liability of shipowners is discussed at 5 Law Quarterly, 15.

[15] See *post*, Chap. IV.

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Where the goods are carried under a contract that they are to be at the "owner's risk," the carrier is free from his liability as an insurer, but he is liable as bailee for ordinary negligence and for breach of his undertaking to deliver at the proper time.[1]

Carriers Act.

The Act known as the Carriers Act[2] provides that common carriers by land are not to be liable for the loss of goods of certain classes above the value of £10, unless the value and nature of the goods are declared by the person sending them, and such increased payment as is notified by a conspicuous notice in the office where the goods are received is paid. In this section "loss" means loss by the carrier, not the loss occasioned to the owner by non-delivery.[3] Railway and canal companies are incapable of restricting their liability for loss or injury occasioned by their neglect or default,[4] including loss in respect of steam vessels worked by railway companies, except by conditions which "appear to the Court to be just and reasonable," and which are contained in a contract signed by the party or the person delivering the goods to the company.[5] Railway companies are common carriers of passengers' luggage, whether carried in the luggage van or in the carriage with the passenger.[6]

Shipowners' liability.

The common law liability of a shipowner is limited by the Merchant Shipping Act, 1894,[7] which prevents him from being liable for loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of the ship in any district where the employment of such pilot is compulsory by law, or for loss arising without his fault or privity, or for fire on board ship, or for loss in respect of certain articles specified in the Act, unless the owner or shipper declares the nature and value thereof at the time of shipping: and in certain cases from being liable for more than the value of the ship and freight: and his liability is limited in some cases to £15, and in other cases to £8, per ton of the ship's tonnage.[8]

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[1] *D'Arc* v. *L. & N. W. R. Co.*, L. R. 9 C. P. 325; *Mitchell* v. *L. & Y. R. Co.*, L. R. 10 Q. B. 256.

[2] 11 Geo. 4 & 1 Will. 4, c. 68.

[3] *Millen* v. *Brasch*, 10 Q. B. D. 142.

[4] See *Shaw* v. *G. W. R. Co.*, [1894] 1 Q. B. 373.

[5] The Railway and Canal Traffic Acts, 1854 and 1888 (17 & 18 Vict. c. 31, s. 1; 51 & 52 Vict. c. 25); the Regulation of Railways Act (31 & 32 Vict. c. 119, s. 16); *Peek* v. *N. Staff. R. Co.*, E. B. & E. 986; *Doolan* v. *Mid. R. Co.*, 2 App. Cas. 792; *M. S. & L. R. Co.* v. *Brown*, 8 *Id.* 703; *G. W. R. Co.* v. *McCarthy*, 12 *Id.* 218.

[6] *G. W. R.* v. *Bunch*, 13 App. Cas. 31.

[7] 57 & 58 Vict. c. 60, ss. 502, 503, 633.

[8] *Ib.* s. 503.

Duty of bailor.

It is the duty of a person lending a thing to another not to conceal from the borrower any defects known to him which may render the use of the thing perilous or unprofitable to the borrower;[1] but the lender is not liable for injury to the borrower arising from a defect unknown to him.[2]

Dangerous or defective chattel.

It is the duty of a person who gives dangerous goods to a carrier, whether by land[3] or sea,[4] to give notice of their character to him.[5] It is the duty of the letter in contracts of hiring to supply a thing reasonably fit for the purpose for which it is intended to be used,[6] unless the hiring is of a specific and agreed chattel.[7]

Possessory Liens.[8]

Possessory lien defined.

Where a person in possession of goods which belong to another has a right to retain them until his pecuniary demands against that other are satisfied, he is said to have a possessory lien on the goods.[9] A possessory lien does not give any right to sell the goods.[10] There are a few cases in which the term "lien" is applied to certain priorities that a creditor may obtain over property not in his possession.[11] Liens of this nature are equitable liens, or maritime liens.[12] They are independent of possession, and are merely rights to have specific property applied in satisfaction of the creditor's claim.

Equitable lien.

How liens arise and are lost.

No lien arises unless the goods have come lawfully into the possession of the person claiming the lien[13] in the ordinary course of business, and not for a special purpose inconsistent with the lien. There is no lien where, from the nature of the transaction, the possession of the holder is subject to the owner's right of

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[1] *Blakemore* v. *Bristol and Exeter R. Co.*, 8 E. & B. 1035.

[2] *MacCarthy* v. *Young*, 6 H. & N. 329; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

[3] *Farrant* v. *Barnes*, 11 C. B. N. S. 553.

[4] *Brass* v. *Maitland*, 6 E. & B. 470; *Williams* v. *East India Co.*, 3 East, 192; 6 R. R. 589.

[5] As to specially dangerous goods, see the Explosives Act, 1875 (38 & 39 Vict. c. 17); the Merchant Shipping Act, 1894, ss. 446—450.

[6] *Fowler* v. *Lock*, L. R. 7 C. P. 272; 10 *Id.* 10; *Hyman* v. *Nye*, 6 Q. B. D. 695.

[7] *Robertson* v. *Amazon Tug Co.*, 7 Q. B. D. 598.

[8] 3 Bythewood by Robbins, 640; Fisher on Mortgages, 286; Tudor, L. C. Merc. Law (notes to *Kruger* v. *Wilcox*).

[9] *Hammond* v. *Barclay*, 2 East, 235.

[10] *Mulliner* v. *Florence*, 3 Q. B. D. 484.

[11] 3 Bythewood by Robbins, 650.

[12] We shall not discuss equitable liens; as to maritime liens, see *post*, p. 114.

[13] *Sunbolf* v. *Alford*, 3 M. & W. 248; *Madden* v. *Kempster*, 1 Camp. 12.

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disposition.[1] The lien is generally, though not always, lost by abandoning the possession of the goods;[2] but it is not lost by putting them in the possession of a bailee for safe custody.[3]

Parting with possession.

Where the lien is lost by voluntarily parting with the possession, it is not revived by re-acquiring possession; *secus*, if the loss of possession is involuntary.[4]

There are, however, a few exceptional cases where, though the goods are voluntarily parted with, the lien revives on possession being re-acquired; for instance, an insurance broker, who effects a policy, loses his lien on the policy by voluntarily parting with it, but the lien revives if he regains possession of the policy.[5] If a guest at an inn places a horse in the inn stables, the innkeeper does not lose his lien when the guest takes and uses the horse with the intention of returning it.[6]

Taking security.

A lien is also in many cases lost by taking security; whether or not it is lost by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case.[7]

"Particular" and "general" lien distinguished.

Possessory liens are either "particular" (sometimes called "specific") or "general." A particular lien enables the possessor to retain the goods until payment of a debt due in respect of them; a general lien gives a right to retain the goods until any general balance of account due from the owner to the possessor is paid.[8] Apart from contract, express or implied, it may be said that particular lien is given by common law and general lien by custom or usage,[9] which may be considered as adding an implied term to the principal contract. Particular liens are, but general liens are not, favoured by the law.[10]

Particular lien.

A particular lien may arise (1) at common law, (2) by express contract, (3) by implied contract.

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[1] *Forth* v. *Simpson*, 13 Q. B. 680; *Orchard* v. *Rackstraw*, 9 C. B. 698; *Jackson* v. *Cummins*, 5 M. & W. 342.

[2] *Kruger* v. *Wilcox*, Ambl. 252; 1 Dick. 269; Tudor, L. C. Merc. Law.

[3] *Wilson* v. *Kymer*, 1 M. & S. 157; *Belcher* v. *Oldfield*, 6 Bing. N. C. 102.

[4] *Sweet* v. *Pym*, 1 East, 4; 5 R. R. 497; *Wallace* v. *Woodgate*, Ry. & M. 194; *Ex p. Cheesman*, 2 Eden, 181.

[5] *Levy* v. *Barnard*, 2 J. B. Moo. 34.

[6] *Allen* v. *Smith*, 12 C. B. N. S. 638; 11 W. R. 440.

[7] *Re Taylor*, [1891] 1 Ch. 590; *Angus* v. *M'Lachlan*, 23 Ch. D. 330; *Re Bowes*, 33 Ch. D. 586.

[8] *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 289, per Brett, L. J.

[9] *Houghton* v. *Matthews*, 3 Bos. & P. 494; 7 R. R. 815.

[10] *Rushforth* v. *Hadfield*, 7 East, 224; 8 R. R. 520; *Jacobs* v. *Latour*, 5 Bing. 132.

A particular lien can arise at common law in favour of a person in possession[1] of goods in three different cases:—

(1.) Where he has bestowed labour, or skill, or expense upon or in dealing with the goods;[2]

(2.) Where he is compellable to receive the goods or perform the services in respect of which he claims the lien;[3] and

(3.) Where he has saved the chattel from loss at sea or capture by an enemy.[4]

Lien in respect of work, &c.

A lien claimed in respect of labour done or expense incurred in respect of goods can only be enforced against the owner if it was done or incurred at his request or by his authority;[5] but, subject to the rights of the owner, it may be enforced against any person at whose request or by whose authority the work or expense was done or incurred.[6]

The lien does not arise until the work undertaken is completely performed;[7] but if the owner of the chattel prevents the work from being completely performed, there is a lien for the work actually done.[8]

The lien is only upon the chattel on which the work is done, not on any chattel delivered to the workman to enable him to do the work,[9] as, for instance, a coat sent to a tailor as a pattern. But where the work is an entire work, and is done on several chattels, the lien extends to all of them.[10]

Innkeepers.[11]

An innkeeper is bound to receive every traveller[12] who applies to be admitted as a guest so long as there is room for him in the house, and no good reason for refusing to receive him, and also to receive his goods.[13] He has, in return, a lien on the goods brought

[1] *Heywood* v. *Waring*, 4 Camp. 291; *Shaw* v. *Neale*, 27 L. J. Ch. 444.

[2] *Franklin* v. *Hosier*, 4 B. & Ald. 341; 23 R. R. 305; *Chase* v. *Westmore*, 5 M. & S. 180; 17 R. R. 301; *Howes* v. *Ball*, 7 B. & C. 481; 31 R. R. 256; *Ex p. Willoughby*, 16 Ch. D. 604; *Hollis* v. *Claridge*, 4 Taunt. 807; *Scarfe* v. *Morgan*, 4 M. & W. 270; *Lane* v. *Tewson*, 12 A. & E. 116 (auctioneer's lien).

[3] *Yorke* v. *Grenaugh*, 2 Ld. Raym. 866; *Skinner* v. *Upshaw*, *Id.* 752; *Thompson* v. *Lacy*, 3 B. & Ald. 283; 22 R. R. 385.

[4] *Hartfort* v. *Jones*, 1 Ld. Raym. 393; *Baring* v. *Day*, 8 East, 57. As to salvage, see *post*, p. 116.

[5] *Nicholson* v. *Chapman*, 2 H. Bl. 254; 3 R. R. 374; *Buxton* v. *Baughan*, 6 C. & P. 674; *Lempriere* v. *Pasley*, 2 T. R. 485.

[6] *Hollis* v. *Claridge*, *sup.*

[7] Per Parke, B., *Pinnock* v. *Harrison*, 3 M. & W. 535.

[8] *Lilley* v. *Barnsley*, 2 M. & Rob. 548.

[9] *Sanderson* v. *Bell*, 2 Cr. & M. 304; *Bleaden* v. *Hancock*, 4 C. & P. 152; 34 R. R. 775; *Steadman* v. *Hockley*, 15 M. & W. 553.

[10] *Blake* v. *Nicholson*, 3 M. & S. 167; 15 R. R. 455.

[11] See notes to *Calye's Case*, 1 Sm. L. C. 115.

[12] *Lamond* v. *Richard*, [1897] 1 Q. B. 541.

[13] *Hawthorn* v. *Hammond*, 1 C. & K.

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to the inn by the guest as his goods,[1] whether they belong to him or not;[2] but not on goods brought to the inn by a person who is not a guest,[3] or on goods supplied by a third person for the temporary use of the guest at the inn, and known by the innkeeper to be the property of the third person.[4]

The lien is on all the goods brought by the guest to the inn in respect of the whole of the innkeeper's bill against the guest.[5]

It has been held that the innkeeper has a lien on goods which are the separate property of a married woman, where she and her husband stay at an inn and credit is given to the husband.[6]

Innkeepers Act, 1878.

In addition to the innkeeper's ordinary lien, he has, by the Innkeepers Act, 1878, a power to sell by public auction goods which have been left in his charge or custody for six weeks, and to reimburse himself out of the proceeds the amount due to him from the person depositing the goods for board or lodging, or the keep and expenses of horses or other animals.[7]

Under 26 & 27 Vict. c. 41, an innkeeper may protect himself from liability to make good any loss of property brought to his inn to a greater amount than £30 except (*inter alia*) when the property shall have been lost "through the wilful act, default, or neglect of such innkeeper, or any servant in his employ."[8]

Carriers.

A carrier has a lien on the goods that he carries for the price of the carriage,[9] but not for charges for booking or warehouse room,[10] though, by the usage of a particular trade, or by special bargain, his lien may extend to charges of this nature.[11]

Shipowners.

The owner of a ship has a lien on the goods carried by him for the freight,[12] *i.e.*, the sum payable to him for the carriage of the goods, when he is ready and able to deliver them;[13] and he has a

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404; *Rex* v. *Ivens*, 7 C. & P. 213; *Gordon* v. *Silber*, 25 Q. B. D. 491.

[1] *Thompson* v. *Lacy*, 3 B. & Ald. 283; 22 R. R. 385.

[2] *Threfall* v. *Borwick*, L. R. 10 Q. B. 210; *Snead* v. *Watkins*, 1 C. B. N. S. 267; *Yorke* v. *Grenaugh*, 2 Ld. Raym. 866; *Turrill* v. *Crawley*, 13 Q. B. 197; *Gordon* v. *Silber*, *sup.*; *Robins* v. *Gray*, [1895] 2 Q. B. 501.

[3] *Calye's Case*, *sup.*; *Smith* v. *Dearlove*, 6 C. B. 132.

[4] *Broadwood* v. *Granara*, 10 Ex. 417. See *Robins* v. *Gray*, *sup.*

[5] *Mulliner* v. *Florence*, 3 Q. B. D. 484.

[6] *Gordon* v. *Silber*, *sup.*

[7] 41 & 42 Vict. c. 38.

[8] See *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11.

[9] Per Lord Ellenborough, C. J., *Rushforth* v. *Hadfield*, 6 East, 525.

[10] *Lambert* v. *Robinson*, 1 Esp. 119.

[11] *Rushforth* v. *Hadfield*, 6 East, 519; 8 R. R. 520; 7 East, 224; *Aspinall* v. *Pickford*, 3 Bos. & P. 44, n.

[12] As to the meaning of "freight," see *post*, p. 112.

[13] *Cargo ex Argos*, L. R. 5 P. C. 163; *Kirchner* v. *Venus*, 12 Moore, P. C. C. 390.

lien upon the luggage of a passenger for his passage money.[1] If he is prevented from delivering them by their nature, *i.e.*, owing to goods of that nature being prohibited by law from being landed, he also has a lien for the costs of storage and back freight, *i.e.*, the costs of bringing them back to the port of shipment.[2] Where the cargo is consigned to separate consignees, the part sent to each consignee is subject only to the freight earned in respect of it.[3] The lien is of course lost by delivery of the goods.[4]

Lien by express contract.

A lien which is created by express contract may extend to a case where no lien at common law would arise,[5] and is regulated entirely by the terms of that contract;[6] and, where a lien arises at common law, it may be varied or restricted by express contract; but if a contract contains terms inconsistent with the existence of a lien, then no lien can arise.[7]

Implied lien.

An implied lien is one that arises from the conduct of the parties. All persons dealing with the parties with notice of an agreement for the lien will be bound by it.

General lien.

By a general lien is meant the right of the bailee who carries on a certain kind of trade to retain the goods till the balance due to him from the bailor in respect of that trade is satisfied. It arises:

(1.) In those trades in which it is usual for advances to be made by the bailee to the bailor;[8]

(2.) In other trades, by usage.

If it can be shown that, according to the custom of any particular trade, it is usual for advances to be made by the bailee to the owner of the goods, the right to general lien is admitted;[8] but, in other trades or localities, where it is alleged that the lien exists by usage, the usage must be proved to exist.[9] A general lien may be excluded by express contract; for example, a factor, to whom goods are consigned, does not acquire a general lien on the goods if he

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[1] *Wolf* v. *Summers*, 2 Camp. 631; 12 R. R. 764.

[2] See note,[13] *ante*, p. 34.

[3] *Bernal* v. *Pim*, 1 Gale, 17.

[4] *North* v. *Gurney*, 1 J. & H. 509. See s. 494 of the Merchant Shipping Act, 1894, *post*, p. 60.

[5] *Richards* v. *Symons*, 8 Q. B. 90; *Swainston* v. *Clay*, 11 W. R. 811.

[6] *Norris* v. *Williams*, 1 Cr. & M. 842; *Cumpston* v. *Haigh*, 2 Scott, 684; 2 Bing. N. C. 449; *Hawthorne* v. *Newcastle R. Co.*, 3 Q. B. 734.

[7] *Chase* v. *Westmore*, 5 M. & S. 180; 17 R. R. 301; Tudor's L. C. Merc. Law; *Crawshay* v. *Homfray*, 4 B. & Ald. 50; 22 R. R. 618; *Foster* v. *Colby*, 3 H. & N. 705; *Ex p. Willoughby*, 16 Ch. D. 604; *Re Leith*, L. R. 1 P. C. 305.

[8] *Bock* v. *Gorrissen*, 2 De G. F. & J. 434.

[9] *Bock* v. *Gorrissen*, *sup.*; *Cumpston* v. *Haigh*, *sup.*; *Re Catford*, 71 L. T. 584.

accepts the consignment subject to special directions as to the application of the cargo or the proceeds of sale of it.[1]

Where a bailee claims a general lien by usage, he must show that the general balance that he claims arises from, and that the goods were delivered to him in, exercise of a trade in respect of which the usage exists.[2]

General lien does not affect rights of third parties.

A general lien does not affect the rights of third parties;[3] so that if, for example, a common carrier obtains, by agreement with the consignee, a lien for the general balance of account between them, this does not prevent the consignor from stopping *in transitu*.[4]

Factors.

"A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale; and he usually sells in his own name without disclosing that of his principal."[5] "He is an agent, but an agent of a particular kind. He is an agent entrusted with the possession of goods for the purpose of sale."[6] A mere agent has (as such) no lien, but a factor has a general lien on goods; and he does not lose his character of factor or the right of lien attached to it by reason of special instructions to sell goods at a specified price and in the name of the principal.[7]

It is the custom for factors to make advances to their principals, and therefore[8] a factor has a lien over goods which come into his possession as factor,[9] which lien extends not only to those advances but to the general balance of his account against his principal arising from his employment.[10]

Solicitor's lien.

An important example of a general lien is that which a solicitor has for the amount of his bill on papers of his client, except his will,[11] which have come into his possession as solicitor,[12] but not on

[1] *Frith* v. *Forbes*, 4 De G. F. & J. 409; *Ex p. Heywood*, 2 Rose, 355.

[2] *Dixon* v. *Stansfeld*, 10 C. B. 398.

[3] *Wright* v. *Snell*, 5 B. & Ald. 350; 24 R. R. 413; *Leuckhart* v. *Cooper*, 3 B. N. C. 99; *Richardson* v. *Goss*, 3 B. & P. 119; 6 R. R. 727.

[4] *Oppenheim* v. *Russell*, 3 B. & P. 42; 6 R. R. 604. *Post*, p. 61, as to stoppage *in transitu*.

[5] Per Abbott, C. J., *Baring* v. *Corrie*, 2 B. & Ald. 143; 20 R. R. 383. See *post*, p. 76.

[6] Per Cotton, L. J., *Stevens* v. *Biller*, 25 Ch. D. 31, 37.

[7] *Stevens* v. *Biller*, *sup.*

[8] *Kinloch* v. *Craig*, 3 T. R. 119, 783; 1 R. R. 664.

[9] *Dixon* v. *Stansfeld*, 10 C. B. 398.

[10] *Godin* v. *London Assurance Co.*, 1 Wm. Bl. 104; *Kruger* v. *Wilcox*, 1 Amb. 252; 1 Dick. 269; *Houghton* v. *Matthews*, 3 B. & P. 485; 7 R. R. 815.

[11] *Balch* v. *Symes*, T. & R. 87; 23 R. R. 195. See, generally, Seton on Decrees, 639 *et seq.*

[12] *Stevenson* v. *Blakelock*, 1 M. & S. 535; 14 R. R. 525. The lien was extended to articles delivered to the solicitor to be shown to witnesses on a trial; *Friswell* v. *King*, 15 Sim. 191.

those which have come into his possession in some other capacity;[1] and the lien is confined to what is due to him in his character of solicitor, and does not extend to general debts.[2]

The lien "is not the result of contract; it is not an equitable charge; it is not an incumbrance affecting the estate itself. . . . . It does not confer on the solicitor any higher right to retain deeds than the client himself has."[3]

As the lien is only on the interest in the papers that the client has, it cannot continue after the interest of the client has determined,[4] and it may be defeated by some person showing a better right to the deeds, or the property to which they relate, than the client has.[5] Accordingly, if by the judgment in an action the client is ordered to deliver up deeds, his solicitor who holds them cannot withhold possession on account of his lien;[6] and where a client is bound to produce a deed in the possession of his solicitor, the latter must produce it notwithstanding his lien;[7] and a party will be ordered to produce documents which are in the hands of his former solicitor who claims a lien on them.[8]

"A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the Court, and cannot use that means of obtaining payment."[9] A solicitor will be ordered to hand over documents which have come into his hands since the commencement of proceedings for administration of property, or for winding up, so as to enable the matter to proceed, his lien being preserved.[10]

Order to give up papers for purpose of proceedings.

The Court has jurisdiction, upon payment being made into Court of, or security given for, a sum sufficient to answer the solicitor's demand, to order, before taxation, delivery up by a solicitor of his client's papers, where the retention of them would

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[1] *Champernown* v. *Scott*, 6 Mad. 93; 22 R. R. 248; *Pelly* v. *Wathen*, 1 De G. M. & G. 16; *Vaughan* v. *Vanderstegen*, 2 Dr. 409; *Gibson* v. *May*, 4 De G. M. & G. 512.

[2] *Re Galland*, 31 Ch. D. 296.

[3] Per Chitty, J., *Re Llewellin*, [1891] 3 Ch. 145.

[4] *Re Llewellin*, *sup.*; *Blunden* v. *Desart*, 2 Dr. & War. 426; *Wakefield* v. *Newbon*, 6 Q. B. 276.

[5] *Re Union Brick Co.*, 4 Ch. 627; *Ex p. Nesbitt*, 2 Sch. & Lef. 279; *Blunden* v. *Desart*, *sup.*

[6] *Baker* v. *Henderson*, 4 Sim. 27; *Bell* v. *Taylor*, 8 Sim. 216.

[7] *Furlong* v. *Howard*, 2 Sch. & Lef. 115; *Hope* v. *Liddell*, 7 De G. M. & G. 331.

[8] *Vale* v. *Oppert*, 10 Ch. 340; *Lewis* v. *Powell*, [1897] 1 Ch. 678.

[9] Per James, L. J., *Belaney* v. *French*, 8 Ch. 918, 920.

[10] *Boughton* v. *Boughton*, 23 Ch. D. 169; *Re Capital Fire, &c. Assoc.*, 24 Ch. D. 408; *Boden* v. *Hensby*, [1892] 1 Ch. 101.

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embarrass the client in the prosecution or defence of a pending action.[1]

London agent.

The London agent of a country solicitor has a lien on the papers of the client received from the country solicitor to the extent only of the debt due to the latter from the client in the particular business, and so long only as the country solicitor remains unpaid.[2] As against the country solicitor the agent's lien is general, but as against the client it is particular.[3]

Subject to equities.

The lien is subject to all equities affecting the papers at the time when the solicitor received them,[4] and as to costs incurred after that time to any equities arising before the costs are incurred.[5]

In respect of what claims.

The lien extends only to the solicitor's taxable costs, charges and expenses incurred by him as solicitor for his client; including counsel's fees and all other disbursements which can be moderated by the taxing master, and are not necessarily allowed in full on being vouched; but it does not include ordinary advances or loans.[6]

As against whom.

It can be asserted only against persons by whom or on whose behalf the solicitor was employed and persons claiming under them. It follows that the solicitor of a mortgagee, whether the mortgage is completed or goes off, has no lien as against the mortgagor,[7] and on the same principle, the mortgagee's solicitor cannot, after the mortgagee has been paid his principal, interest, and costs, assert his lien on the title deeds as against the mortgagor for the mortgagee's costs.[8] And a solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage has no lien on title deeds for costs due to him from the mortgagor, unless such lien be expressly given.[9] A solicitor who has prepared a marriage settlement upon the instructions of the husband has no lien upon it as against the trustees.[10]

Taking security.

The solicitor may lose his lien by taking security for his costs;[11]

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[1] *Re Galland*, 31 Ch. D. 296.

[2] *Bray* v. *Hine*, 6 Price, 203; 20 R. R. 623; *Re Andrew*, 7 H. & N. 87.

[3] *Lawrence* v. *Fletcher*, 12 Ch. D. 858.

[4] *Pelly* v. *Wathen*, 1 De G. M. & G. 16.

[5] *Blunden* v. *Desart*, 2 Dr. & War. 405.

[6] *Re Taylor*, [1891] 1 Ch. 590.

[7] *Pratt* v. *Vizard*, 5 B. & Ad. 808; *Lawson* v. *Dickenson*, 8 Mod. 306.

[8] *Wakefield* v. *Newbon*, 6 Q. B. 276; *Re Llewellin*, [1891] 3 Ch. 145.

[9] *Re Snell*, 6 Ch. D. 105: distinguished in *Macfarlane* v. *Lister*, 37 Ch. D. 88; and *Brunton* v. *Electrical Corporation*, [1892] 1 Ch. 434.

[10] *Re Lawrance*, [1894] 1 Ch. 556.

[11] *Balch* v. *Symes*, T. & R. 92; 23 R. R. 195; *Cowell* v. *Simpson*, 16 Ves. 275; 10 R. R. 181.

but "whether a lien is waived or not by taking a security depends upon the intention, expressed or to be inferred from the position of the parties and all the circumstances of the case";[1] and where a solicitor, whose duty it is to give his client clear information as to the facts and to advise him of his rights and liabilities, takes a security for costs without explaining that he intends to reserve his lien, the presumption is that the lien is abandoned.[2]

Discharge of solicitor.

If the client discharges the solicitor, or becomes bankrupt, the solicitor may decline to give access to the papers over which he has a lien till he is paid;[3] but if the solicitor discharges himself during the progress of an action, he may be ordered to give up the papers to the new solicitors, on their undertaking to hold them without prejudice to his lien, and to return them undefaced, and to allow him to have access to them for the purpose of bringing an action for his costs.[4]

Lien on sale moneys.

It is sometimes said that the general lien of a factor,[5] and the particular lien of an auctioneer, on goods placed in his possession for the purposes of sale extends to the purchase-money of goods sold by him, and delivered to the purchaser.[6] The explanation appears to be that, in the supposed cases, the factor or auctioneer has a right to have the purchase-money paid to him; and, on his acquiring possession of that money, his lien attaches. It is rather an abuse of language to say that the lien attaches on the purchase-money before it is paid, for, if the purchaser pays the principal, the remedy of the factor or auctioneer is not against the principal to enforce a lien but against the purchaser to make him pay.

Other classes of persons who have general liens are bankers,[7] wharfingers,[8] policy brokers,[9] dyers,[10] cotton printers,[11] and packers.[12]

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[1] Per Lindley, L. J., *Re Taylor*, *sup.*; *ante*, p. 32.

[2] Per Kay, L. J., *Re Taylor*, [1891] 1 Ch. 601.

[3] *Ex p. Underwood*, De G. 190; *Re Moss*, 2 Eq. 345; *Re Faithfull*, 6 Eq. 325.

[4] *Robins* v. *Goldingham*, 13 Eq. 440.

[5] *Drinkwater* v. *Goodwin*, 1 Cowp. 256.

[6] *Williams* v. *Millington*, 1 H. Bl. 81; 2 R. R. 724; *Robinson* v. *Rutter*, 4 E. & B. 954; consider *Webb* v. *Smith*, 30 Ch. D. 192; *Bellamy* v. *Davey*, [1891] 3 Ch. 540.

[7] *Davis* v. *Bowsher*, 5 T. R. 488; 2 R. R. 650; *Brandao* v. *Barnett*, 3 C. B. 519, 530; *Misa* v. *Currie*, 1 App. Cas. 569; *New London, &c. Bank* v. *Brocklebank*, 21 Ch. D. 302. See *Re Bowes*, 33 Ch. D. 586.

[8] *Naylor* v. *Mangles*, 1 Esp. 109; 5 R. R. 722; *Moet* v. *Pickering*, 8 Ch. D. 372.

[9] *Fisher* v. *Smith*, 4 App. Cas. 1.

[10] *Savill* v. *Barchard*, 4 Esp. 53.

[11] *Weldon* v. *Gould*, 3 Esp. 268; 6 R. R. 832.

[12] *Re Witt*, 2 Ch. D. 489.

CHAPTER III.

SALE OF GOODS.

Chap. III.

Transfer of property in goods.

THE property in corporeal chattels can be transferred by act *inter vivos* in the several manners following:—

(1) By delivery of possession with intent to pass the ownership;

(2) By a contract for sale called a bargain and sale, or a sale and delivery;[1]

(3) By the indorsement and delivery of the bill of lading of goods on board ship;[2]

(4) By deed or instrument in writing called a "bill of sale."[3]

Nemo dat quod non habet.

As a general rule, a man cannot transfer the ownership of goods unless he is the owner of them, and a buyer obtains no better title to them than the seller has.[4] This rule is subject to some exceptions, viz.:—

Exceptions:

Negotiable instruments;

(1) Current coin[5] and negotiable instruments;[6]

Estoppel;

(2) The owner of the goods may by his conduct preclude himself from denying the authority of the seller to sell.[7]

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[1] There must be distinct parties to buy and sell. If, for instance, a club, not being a corporation, supplies goods to its members, there is not, in the proper sense, a sale; *Graff* v. *Evans*, 8 Q. B. D. 373; *Ranken* v. *Hunt*, 10 R. 249. Serjeant Manning, in a learned note to *Bailey* v. *Culverwell* (2 M. & Ry. 566, n.), expresses an opinion that the rule that the property passes by the bargain and sale without delivery is modern, and that it is an anomaly arising from the assumption that, because the thing sold is at the risk of the purchaser, therefore it belongs to him; and he cites Y. B. 17 Edw. 4, 1 and 2, pl. 2. This note is discussed in Blackburn on Sale, p. 26, where it is pointed out that Serjeant Manning misunderstood the case (see 1 Plow. 11 a). In *Wortes* v. *Clifton* (1 Rolle, Rep. 61), Coke says that by the civil law a gift (*done*, which does not necessarily imply a want of consideration) of goods is not good without delivery, otherwise by our law.

[2] *Post*, p. 67.

[3] *Post*, p. 93.

[4] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21 (1). See *Hartop* v. *Hoare*, 3 Atk. 49; per Willes, J., *Whistler* v. *Forster*, 14 C. B. N. S. 257; *Cundy* v. *Lindsay*, 3 App. Cas. 459; *Cole* v. *N. W. Bank*, L. R. 10 C. P. 362; *Hollins* v. *Fowler*, L. R. 7 H. L. 757.

[5] *Higgs* v. *Holiday*, Cro. Eliz. 746; *post*, p. 162.

[6] *Post*, p. 162.

[7] Sale of Goods Act, 1893, s. 21 (1).

A case falls under this exception where the owner makes some statement or does some act with reference to the goods, with the intention of inducing and so as to induce the buyer, being a reasonable person, to act on the belief that he acquires, or has acquired, a good title to the goods, so as to alter his previous position.[1]

(3) Sales by factors and mercantile agents;[2] — Factors;

(4) Sales by persons who remain in possession of goods, or of the documents of title to goods, which they have previously sold to another; or by a person who has bought or agreed to buy goods and has obtained possession of the goods or the documents of title thereto;[3] — Sellers and buyers in possession;

(5) Where a person, who is not the owner of goods, sells them under a common law or statutory power of sale, or under the order of a court of competent jurisdiction.[4] — Power of sale;

(6.) Sale in market[5] overt, according to the usage of the market, to a buyer who does not know of the defect in the title of the seller. — *Market overt.*

Blackstone says:—[6]

"Market overt (that is 'open') in the country is only held on the special days provided for particular towns by charter or prescription;[7] but in London [*i.e.*, the City of London] every day, except Sunday, is market day. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market; but in [the City of] London every shop[8] in which goods are exposed publicly[9]

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[1] *Pickard* v. *Sears*, 6 A. & E. 469; *Freeman* v. *Cooke*, 2 Ex. 654; *Knights* v. *Whiffen*, L. R. 5 Q. B. 660; *Duchess of Kingston's Case*, 2 Sm. L. C. 824, notes. See Pollock on Contracts, 505.

[2] *Ante*, p. 36; *post*, p. 76; Sale of Goods Act, 1893, s. 21 (2a); Factors Act, 1889, s. 2.

[3] Sale of Goods Act, 1893, s. 25; Factors Act, 1889, ss. 8, 9; *post*, p. 77.

[4] Sale of Goods Act, 1893, s. 21 (2b). As to pawnee, see *ante*, p. 28, *post*, p. 67; as to sheriff, see *post*, p. 67; as to County Court bailiff, see *Goodlock* v. *Cousins*, [1897] 1 Q. B. 558; as to master of ship, see notes to *The Gratitudine*, Tudor, L. C. Merc. Law, and *post*, p. 117; as to sale by order of the Court, see Ord. L. r. 2; Ord. LVI. r. 12.

[5] As to markets by charter or prescription, see Elph. N. & C. Interp. 595; *A.-G.* v. *Horner*, 14 Q. B. D. 245; 11 App. Cas. 66; *Goldsmid* v. *G. E. R.*, 9 App. Cas. 927; and, as to statutory markets, *Manchester* v. *Lyons*, 22 Ch. D. 287; *Abergavenny* v. *Straker*, 42 Ch. D. 83.

[6] 2 Bl. 449. See 2nd Instit. 713.

[7] This does not apply to a market recently established under a local Act; *Moyce* v. *Newington*, 4 Q. B. D. 34.

[8] Including warehouses; *Lyons* v. *De Pass*, 11 A. & E. 326; but not wharves; *Wilkinson* v. *King*, 2 Camp. 335.

[9] *Lyons* v. *De Pass*, 11 A. & E. 326. A sale in a back room or upstairs showroom is not in market overt; *Palmer* v. *Wolley*, Cro. Eliz. 454; *Hargreave* v. *Spink*, [1892] 1 Q. B. 25.

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to sale, is market overt for such things only as the owner professes to trade in.[1] But if my goods are stolen from me and sold out of market overt, my property is not altered, and I may take them wherever I find them. . . . . And even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him, though it binds infants, femes covert, idiots or lunatics, and men beyond sea or in prison; or if the goods be stolen from a common person and then taken by the king's officer from the felon and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods. So likewise if the buyer knoweth the property not to be in the seller, or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert, not usually trading for herself; if the sale be not originally and wholly made in a fair or market, or not at the usual hours, the owner's property is not bound thereby.[2] If a man buys his own goods in a fair or market, the contract of sale shall not bind him so that he shall render the price, unless the property had been previously altered by a former sale. And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them when found in his hands who was guilty of the first breach of justice. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested so far as was consistent with that other necessary policy; that purchasers *bonâ fide*, in a fair, open and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller."

Stolen goods.

In the case of stolen goods, notwithstanding the sale was in market overt, the property will, by virtue of the Larceny Act, 1861,[3] and the Sale of Goods Act, 1893,[4] re-vest in the true owner upon his prosecuting the thief to conviction, and at the date of conviction;[5] so that the goods must be restored even by a *bonâ fide* purchaser for value. If stolen goods are sold otherwise than in market overt, the true owner can recover them from an innocent purchaser without prosecuting the thief.[6]

The Larceny Act, 1861,[7] provides that—

Larceny Act, 1861.

"If any person guilty of any such felony or misdemeanour as is

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[1] *Case of Market Overt*, 5 Rep. 83*b*; Tudor, L. C. Merc. Law, 274; Com. Dig. Market, E. Whether a sale *to* the shopkeeper is protected is doubtful; *Hargreave* v. *Spink*, *sup.*

[2] *Clifton* v. *Chancellor*, Moore, 624; *Harvy* v. *Facy*, 2 And. 115; so a sale by sample has not the privilege of market overt; *Crane* v. *London Dock Co.*, 5 B. & S. 313.

[3] 24 & 25 Vict. c. 96, s. 100.

[4] Sect. 24 (1).

[5] *Lindsay* v. *Cundy*, 1 Q. B. D. 348.

[6] *White* v. *Spettigue*, 13 M. & W. 603; *Lee* v. *Bayes*, 18 C. B. 599; *Wells* v. *Abrahams*, L. R. 7 Q. B. 554.

[7] 24 & 25 Vict. c. 96, s. 100; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (3).

mentioned in the Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property, and convicted thereof, the property shall be restored to the owner;" and further, that in every such case the Court before whom such person is tried "shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner."

Conviction of offender.

Property re-vests,

It was held that on conviction the property in the goods or other property re-vested in the true owner, even if no writ of restitution was awarded, and he could sue the purchaser for trover.[1] Now, by the Sale of Goods Act, 1893,[2] it is enacted that "where *goods* have been stolen, and the offender is prosecuted to conviction, the property in the *goods* so stolen re-vests in the person who was the owner of the goods, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise." "Goods," in this Act, include all chattels personal *except* choses in action and money.[3]

when goods have been *stolen*.

Under the Larceny Act the property re-vested, even if the owner, being induced by fraud, had parted with his goods under a contract of sale which passed the property to the purchaser.[4] This has been altered by the Sale of Goods Act, 1893, which provides that "where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not re-vest in the person who was the owner of the goods by reason only of the conviction of the offender."[5] It must be observed that, in the case of goods obtained otherwise than by larceny, the Sale of Goods Act does not expressly take away the power of the Court to order restitution, and it would seem that this power still remains.

Sale of Goods Act, 1893.

By the proviso to sect. 100 of the Larceny Act, a valuable security which has been *bonâ fide* paid or discharged by the person liable, or a negotiable instrument which has been *bonâ fide* transferred for value to a person not having notice of the felony or misdemeanour, does not re-vest, and cannot be ordered to be restored.[6]

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[1] *Scattergood* v. *Silvester*, 15 Q. B. 506.

[2] Sect. 24 (1). See *Payne* v. *Wilson*, [1895] 1 Q. B. 653; 2 *id.* 537.

[3] Sect. 62.

[4] *Vilmont* v. *Bentley*, 12 App. Cas. 471, overruling *Moyce* v. *Newington*, 4 Q. B. D. 32.

[5] Sect. 24 (2).

[6] *Chichester* v. *Hill*, 52 L. J. Q. B. 160.

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Sale of horses.

Special statutory provisions[1] were made more than 300 years ago for the protection of owners of horses in case of sale, by which the passing of the property in them, notwithstanding sale in market overt, is still regulated. The reasons for, and nature of, such provisions are thus given by Blackstone:—[2]

"A horse is so fleet an animal that the stealers of them may flee far off in a short space, and be out of the reach of the most industrious owner. All persons, therefore, that have occasion to deal in horses, and are therefore liable sometimes to buy stolen ones, would do well to observe, that whatever price they may give, or how long soever they may keep possession before it be claimed, they gain no property in a horse that has been stolen, unless it be bought in a fair or market overt; nor even then unless the directions be pursued that are laid down in the statutes 2 P. & M. c. 7, and 31 Eliz. c. 12, by which it is enacted that every horse, so to be sold, shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset in the open and public place used for such sales, and not in any private yard or stable: that the horse shall be brought by both the vendor and vendee to the toll-gatherer or book-keeper of such fair or market: that toll be paid if any be due; and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and the vendor; the latter, either upon his own knowledge, or the testimony of some credible witness. And, even if all these points be fully complied with, yet such sale shall not take away the property of the owner, if within six months after the horse is stolen he puts in his claim before the mayor, or some justice, of the district in which the horse shall be found; and within forty days after that, proves such his property by the oath of two witnesses before such mayor or justice; and also tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. But in case any one of the points before mentioned be omitted or not observed in the sale, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize, or bring an action for, his horse wherever he happens to find him."

Transfer of property in chattel.

Gift.

We have already said that mere transfer of possession operates to transfer the ownership where such is the intention. Where there is no consideration, that is, in cases of gift, this is the only manner in which a transfer of the property in a chattel capable of delivery can be made at law otherwise than by deed.[3]

Contract of sale.

Definition.

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.[4] There may be a

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[1] 2 & 3 Ph. & M. c. 7 (1555), and 31 Eliz. c. 12 (1589).

[2] 2 Bl. 450.

[3] *Post*, Chap. VI.

[4] Sale of Goods Act, 1893, s. 1 (1).

contract of sale between one part owner and another.[1] A "contract of sale" includes an agreement to sell as well as a sale.[2] A "sale" includes a bargain and sale as well as a sale and delivery.[2] A contract of sale may be absolute or conditional.[3]

"Sale."

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.[4] "An agreement to sell" becomes a "sale" when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred.[5]

"Agreement to sell."

The expressions, in this definition, "sale" and "agreement to sell" correspond to the distinction between "executed" and "executory contracts." By an executed contract the property passes at the instant when the contract is made; by an executory contract the property does not pass until some condition is satisfied.[6] Where the contract is executed and passes the property in the goods, it operates as a conveyance, and is called a "bargain and sale."[7]

Lord Blackburn says:—[8]

"It (the contract) may be an agreement perfectly binding on the parties so as to give either of them a remedy against the person and general estate of the other for any default in fulfilling his part of the agreement, but having no effect on the property or right of possession in the goods, and giving the proposed purchaser neither the rights nor the liabilities of the proprietor, so that he has no preferable right to the goods themselves, nor any means of enforcing his demand against them more than any other creditor; and, on the other hand, he is not liable to any loss arising from the destruction or injury of the goods. Such agreements are generally called 'executory agreements.' Or it may be an agreement amounting to a bargain and sale of the goods, transferring to the purchaser the general property in the goods, and with it the rights and liabilities attached to property, so that the purchaser has a specific interest in the goods themselves of which he may avail himself independently of his remedy against the vendor on the contract, and, on the other hand, making him liable to the general risk of any loss befalling the goods. Such an agreement is sometimes called an 'executed' sale, but it is more technically called 'a bargain and sale' of the goods."

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[1] Sale of Goods Act, 1893, sect. 1 (1).
[2] Sect. 62 (1).
[3] Sect. 1 (2).
[4] Sect. 1 (3).
[5] Sect. 1 (4).
[6] *Post*, p. 46.
[7] Shep. Touch. 221.
[8] Blackburn on Sale, Introd. ix.

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When the property passes.

Unascertained goods.

Specific or ascertained goods.

Intention of parties.

Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.[1] Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.[2] To ascertain the intention of the parties, the terms of the contract, the conduct of the parties, and the circumstances of the case must be considered.[3]

"Specific" and "future" goods.

"Specific goods" are goods identified and agreed upon at the time a contract of sale is made.[4] "Future goods" are goods to be manufactured or acquired by the seller after the making of the contract of sale.[5]

"Deliverable state."

Goods are in a "deliverable state" when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.[6]

Rules for ascertaining intention.

Unless a different intention appears,[7] the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

(1) Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.[8]

(2) Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.[9]

(3) Where there is a contract for the sale of specific goods in a

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[1] Act of 1893, s. 16; *Dixon* v. *Yates*, 5 B. & Ad. 340.

[2] Sect. 17 (1); *Seath* v. *Moore*, 11 App. Cas. 350, 370, 380; *Shepherd* v. *Harrison*, L. R. 5 H. L. 127; *McEntire* v. *Crossley*, [1895] A. C. 463.

[3] Sect. 17 (2); *Ogg* v. *Shuter*, L. R. 10 C. P. 162; *Young* v. *Matthews*, L. R. 2 C. P. 127.

[4] Sect. 62 (1). Blackburn on Sale, 152.

[5] Sect. 62 (1); sect. 5. *Watts* v. *Friend*, 10 B. & C. 446; 34 R. R. 477; *Hibblewhite* v. *M'Morine*, 5 M. & W. 462.

[6] Sect. 62 (4).

[7] Sect. 18. *Calcutta Co.* v. *De Mattos*, 32 L. J. Q. B. 329; *Furley* v. *Bates*, 33 L. J. Ex. 53.

[8] Sect. 18, rule 1. *Tarling* v. *Baxter*, 6 B. & C. 360; 30 R. R. 355; Tudor, Merc. Cases, 308.

[9] Sect. 18, rule 2. *Clarke* v. *Spence*, 4 A. & E. 466; *Laidler* v. *Burlinson*, 2 M. & W. 610; *Logan* v. *Le Mesurier*, 6 Moore, P. C. 116; *Rugg* v. *Minet*, 11 East, 210; 10 R. R. 475; *Acraman* v. *Morrice*, 8 C. B. 449.

deliverable state, but the *seller* is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.[1]

(4) When goods are delivered to the buyer on approval, or "on sale or return," or other similar terms, the property passes to the buyer:—(i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;[2] (ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.[3] "Sale or return."

(5) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, by either party, with the assent of the other, the property in the goods thereupon passes to the buyer.[4] Such assent may be express or implied, and may be given after the appropriation is made.[5] Where, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he does unconditionally appropriate the goods to the contract.[6]

In cases of this nature, when the seller makes the appropriation pursuant to authority from the buyer, a

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[1] Sect. 18, rule 3; *Furley* v. *Bates*, 33 L. J. Ex. 43; *Hanson* v. *Meyer*, 6 East, 614; 8 R. R. 572; *Simmons* v. *Swift*, 5 B. & C. 857; 29 R. R. 438.

[2] Sect. 18, rule 4 (a); *Kirkham* v. *Attenborough*, [1897] 1 Q. B. 201, if the buyer pledges the goods.

[3] Sect. 18, rule 4 (b); *Moss* v. *Sweet*, 16 Q. B. 493; *Ray* v. *Barker*, 4 Ex. D. 279; *Elphick* v. *Barnes*, 5 C. P. D. 321.

[4] Sect. 18, rule 5 (1); *Heilbutt* v. *Hickson*, L. R. 7 C. P. 449; *Jenner* v. *Smith*, L. R. 4 C. P. 270; *Aldridge* v. *Johnson*, 7 E. & B. 885.

[5] *Campbell* v. *Mersey Docks*, 14 C. B. N. S. 412.

[6] Sect. 18, rule 5 (2); *Wait* v. *Baker*, 2 Ex. 7; *Joyce* v. *Swann*, 17 C. B. N. S. 102.

difficult question often arises whether the acts done by the seller show a revocable or a final intention to appropriate.[1]

Reservation of right of disposal.

Where specific or subsequently ascertained goods are sold, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled.[2] In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.[2] Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller, *primâ facie*, does reserve the right of disposal.[3]

When the seller draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading, the property in the goods does not pass to him.[4]

Hire and purchase agreements.

Under a "hire and purchase" agreement, where goods are hired upon the terms that the hirer is to pay certain sums of money, and upon payment of all such sums the property in the goods is to pass to him, but until then is to remain in the lessor, the sale is conditional, and the property does not pass until all the money is paid.[5]

Risk *primâ facie* passes with property.

Unless the parties have otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer; but where the property is transferred, the goods are at the buyer's risk whether delivery has been made or not.[6] If, however, delivery has been delayed through the fault of either party, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.[7] The duties or

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[1] Blackburn on Sale, 128.

[2] Sect. 19 (1); *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. 164; *Brandt* v. *Bowlby*, 2 B. & Ad. 932; 36 R. R. 796, delivery to buyer; *Wait* v. *Baker*, 2 Ex. 1, delivery on board ship.

[3] Sect. 19 (2); *Ogg* v. *Shuter*, 1 C. P. D. 47. See sect. 43 (1) (a).

[4] *Shepherd* v. *Harrison*, L. R. 5 H. L. 116, 133; *Cahn* v. *Pockett's Co.*, [1898] 2 Q. B. 61.

[5] See *Ex p. Crawcour*, 9 Ch. D. 419; *Lee* v. *Butler*, [1893] 2 Q. B. 318; *Helby* v. *Matthews*, [1895] A. C. 471.

[6] Sale of Goods Act, 1893, s. 20. See *Elphick* v. *Barnes*, 5 C. P. D. 321, 326; *Sweeting* v. *Turner*, L. R. 7 Q. B. 310. See Chalmers on Sale, 48.

[7] Sect. 20. See *Martineau* v. *Kitching*, L. R. 7 Q. B. 454, 456.

liabilities of the seller or buyer as bailee[1] of the goods are not affected by the above rules.[2]

Where there is an agreement to sell[3] specific goods, and subsequently the goods, without any fault on the part of either party, perish before the risk passes to the buyer, the agreement is thereby avoided.[4] This rule applies to specifically described goods, whether in existence at the time the contract is made or not.[4]

Formalities of the contract.

Subject to the provisions of the Sale of Goods Act, 1893,[5] and of any other statute,[6] a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in either way, or may be implied from the conduct of the parties.[7] The law relating to corporations is not, however, affected by this rule.[8]

Contract for sale of 10*l.* or upwards. Statute of Frauds, s. 17.

It was provided by the Statute of Frauds[9] that:—

"No contract for the sale of any goods, wares, and merchandises, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized."

Lord Tenterden's Act, s. 7.

A question having arisen whether the statute applied to contracts for the sale of goods not at the time capable of being delivered, it was provided by Lord Tenterden's Act,[10] in 1828, that:—

"The said enactment [sect. 17 of the Statute of Frauds] shall extend to all contracts for the sale of goods of the *value* of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

Sale of Goods Act, 1893, s. 4.

Both these enactments are now repealed by the Sale of Goods Act, 1893,[11] and the following provisions are substituted:—[12]

"(1) A contract for the sale of any goods of the value of £10 or

[1] See *post*, p. 53.

[2] Sect. 20.

[3] *Ante*, p. 45.

[4] Sect. 7. See *Howell* v. *Coupland*, L. R. 9 Q. B. 462; 1 Q. B. D. 258; Chalmers on Sale, 19.

[5] Sale of Goods Act, 1893, s. 3.

[6] See Merchant Shipping Act, 1894, ss. 24, 26, 65, as to sale of ships, *post*, p. 109. See 54 Geo. 3, c. 56, s. 4, as to sale of sculpture with copyright, *post*, p. 249.

[7] *Brogden* v. *Metrop. R. Co.*, 2 App. Cas. 666.

[8] Sale of Goods Act, 1893, s. 3.

[9] 29 Car. 2, c. 3, s. 17.

[10] 9 Geo. 4, c. 14, s. 7.

[11] Sect. 60.

[12] Sect. 4.

upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.[1]

"(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.[2]

"(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not."[3]

"Value." "Price."

In sect. 17 of the Statute of Frauds the words were "price" of £10, but in sect. 7 of Lord Tenterden's Act, the words were "value" of £10, and it was decided that the effect of the latter enactment was to substitute "value" for "price" in sect. 17 of the Statute of Frauds.[4] The word "value" is therefore used in the present Act.

Contract not void, but only unenforceable.

In the Statute of Frauds it was provided that the contract should not "be allowed to be good," and it was decided that this did not render the contract void or illegal, but only unenforceable, unless its existence could be proved in one of the alternative manners provided by the Act.[5] The present Act gives effect to these decisions, and provides that the contract "shall not be enforceable by action."

Signature by "party to be charged."

In the Act of 1893 the words "party to be charged or his agent" have been substituted for the words "parties to be charged . . . or their agents" in the Statute of Frauds; for it was always held to be sufficient if the note or memorandum was signed by the party against whom the contract was sought to be enforced.[6]

"Goods."

"Goods," in the Act of 1893,[7] include all chattels personal, other than things in action and money;[8] emblements;[9] industrial grow-

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[1] Sect. 4 (1).
[2] Sect. 4 (2).
[3] Sect. 4 (3).
[4] *Harman* v. *Reeve*, 18 C. B. 587.
[5] *Maddison* v. *Alderson*, 8 App. Cas. 488.
[6] See *Reuss* v. *Picksley*, L. R. 1 Ex. 342.
[7] Sect. 62 (1).
[8] See *Humble* v. *Mitchell*, 11 A. & E. 205; *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.
[9] *Marshall* v. *Green*, 1 C. P. D. 35.

ing crops;[1] and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.[2]

Distinction between contract to do work, and of sale.

The provisions of sect. 4 of the Act of 1893 apply only to a contract of *sale*, and a contract of sale of goods must be carefully distinguished from other similar contracts. If a man purchases from a tailor a coat which the tailor has to make from his own materials, the contract is clearly an executory contract of sale; if a man employs a tailor to make a coat from his (the employer's) materials, the contract is clearly one to do work and not one of sale. There are, however, some intermediate cases where the person who does the work also supplies the materials: such cases present great difficulty. If a man employs a printer to print a book, the printer finding the materials, or a solicitor to draw a deed on parchment belonging to the solicitor, it would be an abuse of language to call such a contract a contract of sale;[3] for neither the book nor the deed, when completed, becomes the property of the printer or solicitor; the employer has such a property in the book or deed as would entitle him to restrain the printer or solicitor from selling it to another. Probably, in cases of this nature, the question whether the contract is one of sale or for work and materials depends upon whether the employer has some previous property in the thing completed, and, if he has, the contract is one to do work, and, if he has not, is one of sale.[4] A contract to make and attach a thing to land, or to an existing chattel, belonging to the employer, is a contract for work and materials, and not a contract of sale.[5]

Exchange or barter.

Where the consideration for the transfer of the property in goods from one person to another consists of other goods, the contract is not one of sale, but of exchange or barter;[6] but if the consideration consists partly of goods and partly of money, it seems that the contract is one of sale.[7]

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[1] *Marshall* v. *Green*, *sup.*

[2] See *Lavery* v. *Pursell*, 39 Ch. D. 508; *Marshall* v. *Green*, 1 C. P. D. 35, 42. Unsevered "tenant's fixtures" are not "goods"; *Lee* v. *Gaskell*, 1 Q. B. D. 700.

[3] *Clay* v. *Yates*, 1 H. & N. 73.

[4] *Lee* v. *Griffin*, 30 L. J. Q. B. 252; 1 Law Quarterly, p. 8.

[5] *Clark* v. *Bulmer*, 11 M. & W. 243; *Anglo-Egyptian Co.* v. *Rennie*, L. R. 10 C. P. 271.

[6] *Harrison* v. *Luke*, 14 M. & W. 139.

[7] *Aldridge* v. *Johnson*, 26 L. J. Q. B. 296; *Sheldon* v. *Cox*, 3 B. & C. 420.

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On reference to the statute[1] it will be observed that there are three alternative ways in which the contract may be evidenced:—

1. Acceptance and actual receipt.

(1) The first alternative is that "the buyer shall accept part of the goods so sold, and actually receive the same."[1]

This has been thus stated, "Acceptance and actual receipt mean a delivery of possession under the contract for sale."[2]

Acceptance and actual receipt do not preclude the buyer from questioning the quantity or quality of the goods, or from disputing the fact of the performance of the contract by the seller;[3] they merely supply the want of a written memorandum of the contract.

Acceptance and receipt were sometimes confused in the earlier cases,[4] but they must be distinguished. Receipt of the goods by the buyer may be evidence of his intention to accept, but is not acceptance. There may be acceptance without receipt, or receipt without acceptance; both acceptance and receipt must be proved in order to bring a case within this alternative.

Acceptance.

An acceptance of goods within this section is when "the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale,"[5] whether the goods have been accepted in performance of the contract or not.[5]

"Acceptance" is here defined only for the purposes of this section, and is a different thing from the acceptance which binds a purchaser to pay for goods.[6]

Instances of acts which amount to an "acceptance" for this purpose are:—Comparing the goods with a sample;[7] taking samples from the bulk after the contract;[8] selling, or offering to sell, the goods to a sub-purchaser;[9] keeping and dealing with a delivery order,[10] or bill of lading,[11] sent to the buyer by the seller.

"Actual receipt."

With regard to "actual receipt," it is important to remember that, as in the case of acceptance, actual receipt is only evidence of the existence of the contract; it does not prove that the seller has performed his part of the contract.

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[1] Sale of Goods Act, 1893, s. 4 (1).

[2] Pollock and Wright, 71.

[3] *Morton* v. *Tibbett*, 15 Q. B. 428; *Page* v. *Morgan*, 15 Q. B. D. 228; *Taylor* v. *Smith*, [1893] 2 Q. B. 65.

[4] *Castle* v. *Sworder*, 6 H. & N. 828; *Marvin* v. *Wallis*, 6 E. & B. 726.

[5] Act of 1893, s. 4 (3), *ante*, p. 50; *Abbott* v. *Wolsey*, [1895] 2 Q. B. 97.

[6] *Abbott* v. *Wolsey*, [1895] 2 Q. B. 97, 100. See sect. 35 of the Act of 1893.

[7] *Page* v. *Morgan*, 15 Q. B. D. 228; *Abbott* v. *Wolsey*, *sup.*

[8] *Gardner* v. *Grout*, 2 C. B. N. S. 340.

[9] *Chaplin* v. *Rogers*, 1 East, 192; 6 R. R. 249; *Blenkinsop* v. *Clayton*, 7 Taunt. 597; 18 R. R. 602.

[10] *Farina* v. *Home*, 16 M. & W. 119.

[11] *Currie* v. *Anderson*, 2 E. & E. 592.

The question as to what amounts to actual receipt is not free from difficulty, and it depends in part upon the question in whose possession the goods are at the time of the contract of sale. They may be—(1) in the possession of the seller, or (2) in the possession of some person as his agent or bailee, who may be either a stranger or the buyer himself.

Goods in possession of seller.

It will be found in all cases of "actual receipt" that either the possession of part of the goods is changed, or, if this is not the case, that the character of the possession is changed.

Change of possession.

First. Suppose the goods to be in the possession of the seller.

In this case, if the buyer removes any part of the goods by virtue of the contract, he has "actually received" them.

Where the seller delivers goods to a common carrier for conveyance to the buyer, they pass out of the seller's possession, but do not pass into the possession of the buyer, and yet, by an anomaly, the delivery to the carrier is considered as "actual receipt" by the buyer. In other words, the common carrier is considered as the agent of the buyer for the purpose of receiving, though not of accepting, the goods;[1] and, on goods being delivered to the carrier, he becomes the bailee of the buyer, not of the seller.

Delivery to carrier.

If the seller agrees with the buyer that he will hold the goods for him, this changes the character of the possession of the seller, so that he becomes the bailee of the buyer, and amounts to actual receipt by the buyer.[2]

Change of character of possession.

Secondly. Where, at the time of the sale, the goods are in the possession of a third person as bailee for the seller. In this case, the agreement of the seller and buyer, with the assent of the bailee, that the bailee shall hold the goods for the buyer, operates as an "actual receipt" by the buyer. No change of possession takes place; it remains with the bailee; but the character of his possession is changed; he was bailee for the seller, he becomes bailee for the buyer. But the mere giving of a delivery order to the buyer by the seller does not operate as an "actual receipt" by the buyer until it has been assented to by the bailee.[3]

Goods in possession of third person.

Thirdly. The goods may, at the time of the contract of sale, be in the possession of the buyer as bailee of the seller.

Buyer in possession as bailee.

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[1] *Hart* v. *Bush*, E. B. & E. 494; *Hunt* v. *Hecht*, 8 Ex. 814; *Smith* v. *Hudson*, 6 B. & S. 431; *Norman* v. *Phillips*, 14 M. & W. 277.

[2] *Elmore* v. *Stone*, 1 Taunt. 458; *Marvin* v. *Wallis*, 6 E. & B. 726; *Cusack* v. *Robinson*, 1 B. & S. 299.

[3] *Farina* v. *Home*, 16 M. & W. 119; *Godts* v. *Rose*, 17 C. B. 229.

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In this case there can be no change of possession, but the character of the possession may be changed; instead of holding the goods as bailee of the seller, the buyer may hold them as owner, and this will amount to an "actual receipt" by him. Evidence of acts of the buyer which are inconsistent with his holding the goods as bailee is sufficient to show that the character of his possession is changed.[2]

Acceptance and receipt need not be contemporaneous.

Acceptance and actual receipt need not be contemporaneous. Acceptance may precede or follow the receipt. If the buyer re-sells the goods before the seller has parted with them or agreed to hold as bailee for the buyer, the acceptance necessarily precedes the receipt; if the seller dispatches them by a common carrier before acceptance by the buyer, the receipt necessarily precedes the acceptance; and, lastly, in the case of the buyer selecting goods in a shop, buying them and taking them away with him, acceptance and receipt are contemporaneous.[2]

2. Earnest or part payment.

(2) The second alternative is giving "something in earnest to bind the contract or in part payment."

Earnest and part payment are often confounded, but they are of totally different natures. Payment, and therefore part payment, cannot be made until the contract is concluded, while earnest is given for the purpose of binding the contract. In other words, payment is made after the contract; earnest is given simultaneously with the conclusion of the contract. Part payment is part of the price, earnest is not, as a rule, part of the price;[3] payment must be in money; earnest need not be money.[3]

It may, perhaps, be necessary to point out that, as the buyer must "give" the earnest, merely stroking the hand of the seller with a shilling and not giving it to him is not sufficient.[4]

Part payment by set-off.

Sometimes it is intended that a debt due from the seller to the buyer should be set off against the price and operate as part payment, and the question then arises whether this is part payment within the section. It appears to be established that if the agreement for set-off is part of the contract of sale which it is wished to prove, the set-off is not part payment within the section; but that,

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[1] *Edan* v. *Dudfield*, 1 Q. B. 302; *Lillywhite* v. *Devereux*, 15 M. & W. 285.

[2] *Cusack* v. *Robinson*, 1 B. & S. 299.

[3] *Howe* v. *Smith*, 27 Ch. D. 101.

[4] *Blenkinsop* v. *Clayton*, 7 Taunt. 597; 18 R. R. 602.

on the other hand, if the agreement for a set-off is made independently of the contract of sale, it may operate as part payment within the section.[1]

3. Note or memorandum.

(3) The third alternative is that "some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf."

What it must contain.

The note or memorandum must contain all the essential terms of the contract.[2] It must describe the parties by name or other sufficient description,[3] the goods sold,[4] the price if it has been agreed,[5] and any other express term of the contract.[6]

Price.

If no agreement has been come to as to the price of the goods, there is an implied agreement to pay what the goods are reasonably worth,[7] but this need not be stated in the note or memorandum.[8]

Distinction between written contract and "note."

There is an important distinction between a contract reduced into writing and signed by both parties, and a "note or memorandum" sufficient to satisfy the statute. In the first case evidence is not admissible to show that the contract is not that which is expressed in writing;[9] in the latter case evidence is admissible to show that a document which seems to show a complete contract does not truly record the contract which was in fact made, or that no contract was in fact concluded.[10] The statute is "a weapon of defence, not offence, and it does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties."[11]

Parol evidence.

It is hardly necessary to say that evidence of the circumstances of the parties to the contract is admissible for the purpose of ascertaining in what meanings they used the words in the note. This is part of the general law as to the interpretation of documents.[12]

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[1] *Walker* v. *Nussey*, 16 M. & W. 302; Benjamin on Sale, 204.

[2] *Egerton* v. *Mathews*, 6 East, 307; 8 R. R. 489; *M'Clean* v. *Nicolle*, 9 W. R. 811.

[3] *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316; *Newell* v. *Radford*, L. R. 3 C. P. 52; *Allen* v. *Bennet*, 3 Taunt. 167; 12 R. R. 633.

[4] *Thornton* v. *Kempster*, 5 Taunt. 786; 15 R. R. 658; *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

[5] *Elmore* v. *Kingscote*, 5 B. & C. 583; 29 R. R. 341; *Acebal* v. *Levy*, 10 Bing. 376.

[6] *Cooper* v. *Smith*, 15 East, 103; 13 R. R. 397; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *M'Clean* v. *Nicolle*, 9 W. R. 811 (as to quality).

[7] Sale of Goods Act, 1893, s. 8 (2).

[8] *Hoadly* v. *M'Laine*, 10 Bing. 482.

[9] Elph. N. & C. Interp. 36.

[10] *Hussey* v. *Horne-Payne*, 4 App. Cas. 320; *Bristol Co.* v. *Maggs*, 44 Ch. D. 613; *Bellamy* v. *Debenham*, 45 *Id.* 493; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.

[11] *Jervis* v. *Berridge*, 8 Ch. 360, per Lord Selborne.

[12] See Elph. N. & C. Interp., chap. 4.

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Variation of the contract.

Bearing in mind that, at common law, it is competent to the parties to a written contract, not under seal, to alter, vary, or revoke it by parol, it might be supposed that a similar rule applied to a contract evidenced by a note in writing under this section. But this is not the case; for, though the parties may revoke the contract by parol,[1] they cannot vary it by parol;[2] the reason apparently being that the only contract made enforceable by the note in writing is the contract of which that writing is a note, so that if the contract is varied by parol, the writing is no longer a note of the contract as varied, and therefore the written note does not show the contract as varied.

Note contained in several documents.

The note of the contract may be contained in several documents, and one only of such documents need be signed.[3] The several documents must be annexed to each other, or the connection between them must appear upon the face of the documents.[3] Parol evidence is not admissible for the purpose of connecting the documents;[3] but it is admissible to identify a document referred to, or to show that a reference, which may be to a document, is in fact such a reference.[4]

Signature.

It will be observed that the signature required is that of "the party to be charged or his agent in that behalf." The signature of the party seeking to enforce the contract is not necessary.[5] The effect of this is somewhat curious. The contract can be enforced only against the person who has signed the note or memorandum, so that in effect the contract is or is not enforceable at the election of the party who does not sign.[6]

Place and mode of signature.

The signature need not be at the end of the note or memorandum; it is sufficient if it is so introduced as to govern and authenticate every material or operative part of it.[7] If the name appears in an unusual position, it is a question of fact in each case whether it

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[1] *Goss* v. *Nugent*, 5 B. & Ad. 58; *Morgan* v. *Bain*, L. R. 10 C. P. 15.

[2] *Plevins* v. *Downing*, 1 C. P. D. 220; *Noble* v. *Ward*, L. R. 2 Ex. 135.

[3] *Boydell* v. *Drummond*, 11 East, 142; 10 R. R. 450; *Cave* v. *Hastings*, 7 Q. B. D. 125; *Studds* v. *Watson*, 28 Ch. D. 305; *Taylor* v. *Smith*, [1893] 2 Q. B. 65; *Pearce* v. *Gardner*, [1897] 1 Q. B. 688; *Birkmyr* v. *Darnell*, 1 Sm. L. C. 296.

[4] *Long* v. *Millar*, 4 C. P. D. 450; *Taylor* v. *Smith*, *sup.* at 74.

[5] *Laythoarp* v. *Bryant*, 2 B. N. C. 735; *Liverpool Bank* v. *Eccles*, 4 H. & N. 139.

[6] *Reuss* v. *Picksley*, L. R. 1 Ex. 342; *Smith* v. *Neale*, 2 C. B. N. S. 67.

[7] *Caton* v. *Caton*, L. R. 2 H. L. 127; *Evans* v. *Hoare*, [1892] 1 Q. B. 593; *Re Hoyle*, [1893] 1 Ch. 84.

was intended as a signature.[1] Signature may be by print, mark, initials, or stamp.[2]

When it must be made.

The note or memorandum need not be contemporaneous with the contract, but may be signed either before or after the contract is concluded. For instance, it may be contained in a written proposal which is afterwards verbally accepted,[3] or in the minutes of a meeting,[4] or in a subsequent letter repudiating liability under the contract.[5] It must, however, be in existence when an action upon the contract is *commenced*.[6]

Immaterial to whom addressed, or for what purpose made.

It is immaterial for what purpose the note is made, or to whom it is addressed; any writing embodying the terms of a contract and signed by the person to be charged is sufficient.[7] Thus, a recital in a will,[8] an affidavit made in other proceedings,[9] or a letter written to a third person,[10] may be sufficient.

By agent.

The authority of an agent to sign must be determined according to the ordinary rules of agency,[11] but one party cannot be the agent of the other to sign for him.[12] An auctioneer is the agent of both buyer and seller, and a memorandum signed by him, at the time of the sale,[13] will bind both parties;[14] an auctioneer's clerk also may be, and very often is, the agent of the purchaser to sign his name.[15]

Contracts not to be performed within one year.

Since executory contracts of sale are included within sect. 4 of the Sale of Goods Act, 1893, the operation of the following section of the Statute of Frauds must be very limited in regard to the sale of goods:—

Statute of Frauds, s. 4.

"No action shall be brought . . . . (5) upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought,

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[1] *Johnson* v. *Dodgson*, 2 M. & W. 653; *Durrell* v. *Evans*, 1 H. & C. 174; *Sims* v. *Landray*, [1894] 2 Ch. 318.

[2] See notes to *Wain* v. *Warlters*, 1 Sm. L. C. 318.

[3] *Reuss* v. *Picksley*, L. R. 1 Ex. 342; *Re New Eberhardt Co.*, 43 Ch. D. 118.

[4] *Jones* v. *Victoria Co.*, 2 Q. B. D. 314.

[5] *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; *Wilkinson* v. *Evans*, L. R. 1 C. P. 407, 411.

[6] *Lucas* v. *Dixon*, 22 Q. B. D. 357; *Re Hoyle*, [1893] 1 Ch. 84, 97.

[7] *Re Hoyle*, [1893] 1 Ch. 84, 98, 99.

[8] *Re Hoyle*, *sup.*

[9] *Barkworth* v. *Young*, 4 Drew. 1; see *Lucas* v. *Dixon*, 22 Q. B. D. 357.

[10] *Gibson* v. *Holland*, L. R. 1 C. P. 1.

[11] See notes to *Wain* v. *Warlters*, 1 Sm. L. C. 321. *Post*, Chap. V.

[12] *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.

[13] *Mews* v. *Carr*, 1 H. & N. 484; *Bell* v. *Balls*, [1897] 1 Ch. 663, *post*, p. 72.

[14] *Simon* v. *Metivier*, 1 W. Bl. 599; *Beer* v. *London*, 20 Eq. 412, 426; *White* v. *Proctor*, 4 Taunt. 209; 13 R. R. 580.

[15] *Bird* v. *Boulter*, 4 B. & Ad. 443; *Sims* v. *Landray*, [1894] 2 Ch. 318; *Bell* v. *Balls*, [1897] 1 Ch. 663.

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or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."[1]

"Where the agreement distinctly shows upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."[2] It has, however, been decided that where the whole of what has to be done by one party is to be performed within a year, the case is not within the statute.[3]

Pleading.

It remains to be added that where in an action it is intended by either party to rely upon sect. 4 of the Sale of Goods Act, 1893, or on the Statute of Frauds, in answer to a claim, he must raise such matter by his pleading in the High Court,[4] or by notice in the County Court.[5]

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[1] 29 Car. 2, c. 3, s. 4. See notes to *Peter* v. *Compton*, 1 Sm. L. C. 301.

[2] *Souch* v. *Strawbridge*, 2 C. B. 815, per Tindal, C. J.; see *McGregor* v. *McGregor*, 21 Q. B. D. 424.

[3] *Donellan* v. *Read*, 3 B. & Ad. 899; *Cherry* v. *Heming*, 4 Ex. 631; *Miles* v. *New Zealand Co.*, 32 Ch. D. 266.

[4] R. S. C. Ord. XIX. r. 15.

[5] *Brutton* v. *Branson*, [1898] 2 Q. B. 219.

CHAPTER IV.

SALE OF GOODS—(*continued*).

Delivery—Vendor's Lien—Stoppage in Transitu—Representation—Condition Precedent—Warranty—Bills of Lading.

As we have already said, although goods be not delivered, the buyer may become the owner of the goods; but where they have not been paid for, the property in them passes to the buyer subject to the lien of the seller for the unpaid purchase-money. The buyer, having the property in the goods, has *primâ facie* the right to possess them; but this right may be made conditional by the terms of the agreement.

Delivery.

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract.[1] Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.[2]

Duty of seller and buyer.

Place of delivery.

It depends upon the contract between the parties in each case, whether the buyer must take possession of the goods or the seller send them to the buyer.[3] But apart from any contract, the place of delivery is the seller's place of business, if he have one, and, if not, his residence.[3] If, however, the contract is in respect of specific goods, which are, to the knowledge of the parties, in some other place at the time of the contract, then that place is the place of delivery.[3]

Time of delivery.

If the seller is bound to send the goods to the buyer, and no

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[1] Sale of Goods Act, 1893, s. 27. Delivery is defined, sect. 62 (1). See Pollock and Wright on Possession, 43.

[2] *Ib.* sect. 28. See notes to *Cutter* v. *Powell*, 2 Sm. L. C. 11.

[3] *Ib.* sect. 29 (1).

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time is fixed, he must send them within a reasonable time.[1] A demand or tender of delivery may be treated as ineffectual if made at an unreasonable hour.[2]

Goods in possession of third person.

Goods which are, at the time of sale, in the possession of a third person, are not delivered by the seller to the buyer until such person acknowledges to the buyer that he holds for him.[3]

Delivery to carrier.

If the seller is authorized or required to send the goods to the buyer, delivery to any carrier for the purpose of transmission to the seller is *primâ facie* a delivery to the buyer.[4]

If the vendor delivers the goods to the buyer without receiving payment, he has no further rights over the goods, and his only remedy is to bring an action for the price.

Unpaid seller's lien.

Notwithstanding that the property in the goods may have passed to the buyer, an unpaid seller,[5] who is in possession of the goods, has a lien on the goods, or a right to retain them for the price while he is in possession of them until payment or tender of the price, in the following cases:—(1) where there is no stipulation as to credit; (2) where the goods are sold on credit, but the term of credit has expired; (3) where the buyer becomes insolvent.[6]

In what cases.

Where seller agent or bailee for buyer.

The seller may exercise this right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.[7]

Where part delivery.

If part of the goods has been delivered, the unpaid seller may exercise his right of lien or retention on the remainder, unless the part delivery has been so made as to show an intention to waive the lien or right of retention.[8]

Termination of lien.

The unpaid vendor loses his lien, or right of retention, (1) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal[9] of the goods; (2) when the buyer or his agent lawfully obtains possession of the goods; (3) by waiver thereof.[10]

This lien or right of retention is not lost by reason only that the vendor has obtained judgment for the price of the goods.[11]

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[1] Sale of Goods Act, 1893, sect. 29 (2).

[2] *Ib.* sect. 29 (4).

[3] *Ib.* sect. 29 (3).

[4] *Ib.* sect. 32 (1).

[5] As to the meaning of "unpaid seller" and "seller," see sect. 38.

[6] *Ib.* sects. 39 (1), 41 (1). See Blackburn on Sale, 325; *Ex p. Chalmers*, 8 Ch. 289. As to insolvency, see sect. 62 (3), *post*, p. 61.

[7] *Ib.* sect. 41 (2). See *Grice* v. *Richardson*, 3 App. Cas. 319.

[8] *Ib.* sect. 42. See *post*, p. 62.

[9] As to reservation of right of disposal, see sect. 19, *ante*, p. 48.

[10] *Ib.* sect. 43 (1).

[11] *Ib.* sect. 43 (2).

Stoppage *in transitu*.

When the buyer of goods becomes insolvent, the unpaid seller who has parted with possession has the right of stopping the goods *in transitu*, that is to say, he may resume possession of the goods so long as they are in course of transit, and may retain them until payment or tender of the price.[1] A person is "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay them as they become due, whether he has committed an act of bankruptcy or not.[2]

Stoppage *in transitu* and vendor's lien are sometimes confounded.[3] Vendor's lien arises when the buyer is in default, be he solvent or insolvent. Stoppage *in transitu* arises on the insolvency of the buyer, whether he is in default or not. The lien can only be asserted while the goods are in the possession of the vendor or his bailee; stoppage *in transitu* can only be asserted while the goods are in the hands of a third person who holds them for the purposes of transmission only, and not at the will of either the vendor or the buyer.

The right of stoppage *in transitu* is exerciseable whether the vendor is wholly or partially[4] unpaid; and even if the goods were purchased on credit which had not expired at the time of stoppage.[5]

Duration of transit.

Goods are in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery from such carrier or bailee.[6]

If the buyer obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.[7] If, after their arrival at the appointed destination, the carrier or other bailee agrees to hold and does hold the goods as bailee for the buyer, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.[8] If the buyer rejects the goods and the carrier continues in possession, the

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[1] Sale of Goods Act, 1893, s. 44. See notes to *Lickbarrow* v. *Mason*, 1 Sm. L. C. 719.

[2] *Ib.* sect. 62 (3).

[3] See as to the distinction between them, per Lord Campbell, *M'Ewan* v. *Smith*, 2 H. L. C. 328.

[4] *Hodgson* v. *Loy*, 7 T. R. 440; 4 R. R. 483.

[5] *Inglis* v. *Usherwood*, 1 East, 515; *Botlingk* v. *Inglis*, 3 East, 381; 7 R. R. 490.

[6] Sale of Goods Act, sect. 45 (1); *Kendal* v. *Marshall*, 11 Q. B. D. 356; *Bethell* v. *Clark*, 20 *Ib.* 615.

[7] *Ib.* sect. 45 (2); *Whitehead* v. *Anderson*, 9 M. & W. 518, 534.

[8] *Ib.* sect. 45 (3); *Ex p. Cooper*, 11 Ch. D. 68, 78.

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transit is not at an end, even though the seller refuse to receive them back.[1]

When goods are delivered to a ship chartered by the buyer it is a question, depending on the circumstances of each particular case, whether they are in possession of the master as a carrier, or as agent for the buyer.[2]

If the carrier wrongfully refuses to deliver the goods to the buyer or his agent, the transit is then at an end.[3]

Effect of part delivery.

If part delivery of the goods has been made to the buyer or his agent, the remainder may be stopped *in transitu*, unless the circumstances of the part delivery show an agreement to give up possession of the whole.[4]

The delivery of part may have been for the purpose of separating that part from the whole; in which case the seller's lien, or right to stop *in transitu*, as the case may be, still exists over the remainder. On the other hand, part may have been delivered without any intention to separate it from the remainder, and in the process of delivering the whole, in which case the seller's rights are gone as to the whole.[4]

It should perhaps be noted that the carrier may agree to hold the goods as the bailee of the vendor, in which case the latter can exercise his vendor's lien, but not the right to stop *in transitu*.

Effect of vendor drawing bills for price.

The effect of the vendor drawing bills for the price on the buyer, and the latter accepting them, depends upon the intention of the parties. It may be the intention of the parties that this shall amount to payment; but *primâ facie* the effect is merely to give credit to the buyer for the period during which the bill has to run,[5] so as to suspend the vendor's lien and his right to sue for the price until the bill arrives at maturity and is dishonoured,[6] or the buyer becomes insolvent. It has not the effect of defeating the vendor's right of stoppage *in transitu*.[7]

How stoppage *in transitu* is effected.

The vendor may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the

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[1] Sale of Goods Act, 1893, s. 45 (4).

[2] *Ib.* sect. 45 (5).

[3] *Ib.* sect. 45 (6); *Bird* v. *Brown*, 4 Exch. 786.

[4] *Ib.* sect. 45 (7); *Kemp* v. *Falk*, 7 App. Cas. 573; *Ex p. Cooper*, 11 Ch. D. 68; *Tanner* v. *Scovell*, 14 M. & W. 28.

[5] *Hewison* v. *Guthrie*, 2 B. N. C. 755; Sale of Goods Act, 1893, s. 38 (1).

[6] *Valpy* v. *Oakeley*, 16 Q. B. 941; *Griffiths* v. *Perry*, 1 E. & E. 680.

[7] *Patten* v. *Thompson*, 5 M. & S. 350; 17 R. R. 350; *Gunn* v. *Bolckow*, 10 Ch. 491, 501.

goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent delivery to the buyer.[1] Notice.

When notice is so given to the carrier or other bailee in possession of the goods, he must re-deliver the goods to the seller or according to his directions, the expenses of such re-delivery being borne by the seller.[2] Re-delivery.

As a general rule the right of lien, or retention, or stoppage *in transitu*, is not affected by any sale or other disposition of the goods made by the buyer unless the seller has assented thereto.[3] If, however, a document of title to goods has been properly transferred to any person as buyer or owner of the goods, and that person transfers the document to a third person, who takes it in good faith and for value, if such transfer to a third person was by way of sale, it defeats the rights of the unpaid vendor; and if it was by way of pledge or other disposition for value, the rights of the unpaid vendor are subject to those of the transferee.[4] Effect of sale or pledge by buyer.

A contract of sale is not, in general, rescinded by the mere exercise by an unpaid vendor of his right of lien or retention or stoppage *in transitu*.[5] If the vendor has exercised such right, and has re-sold the goods, the buyer acquires a good title as against the original buyer.[6] Effect of lien or stoppage *in transitu*.

When the goods are of a perishable nature, or the vendor gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid vendor may re-sell the goods and recover damages for any loss occasioned by the breach of contract by the original buyer.[7] Right of re-sale.

If the vendor expressly reserves a right of re-sale in case the buyer makes default, and, on default by the buyer, re-sells the

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[1] Sale of Goods Act, 1893, s. 46 (1); *Whitehead* v. *Anderson*, 9 M. & W. 518.

[2] *Ib.* sect. 46 (2).

[3] *Ib.* sect. 47; *Dixon* v. *Yates*, 5 B. & Ad. 313.

[4] *Ib.* sect. 47; *Leask* v. *Scott*, 2 Q. B. D. 376. See notes to *Lickbarrow* v. *Mason*, 1 Sm. L. C. 733—740. As to documents of title, see sect. 62; and cf. sect. 1 of the Factors Act, 1889.

[5] *Ib.* sect. 48 (1); *Kemp* v. *Falk*, 7 App. Cas. 573, 578; *Schotsmans* v. *L. & Y. R. Co.*, 2 Ch. 332, 340.

[6] *Ib.* sect. 48 (2).

[7] *Ib.* sect. 48 (3). See notes to *Lickbarrow* v. *Mason*, 1 Sm. L. C. 723.

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goods, the original contract of sale is thereby rescinded, but the vendor retains any claim he may have for damages.[1]

Misrepresentation—Condition Precedent—Warranty.

There are distinctions between a representation, a condition precedent, and a warranty.[2]

Representation.

A representation by a seller of goods is a statement of fact (not of law[3]) made by the seller, before or at the time of making the contract of sale, of some matter or circumstance relating to it, which, even if it appears on the face of the contract, is not one of its terms.[4]

It follows that, if the representation is untrue, the contract is not broken, unless, indeed, the representation is as to the subject-matter of the contract, so that, if the representation is untrue, the purchaser does not get the thing that he bargained for; in which case the representation amounts to a condition precedent, and the person to whom it was made can decline to perform the contract.[5]

Action of deceit for fraudulent misrepresentation.

If the representation is not only untrue but fraudulent, *i.e.*, if the seller made it knowing that it was untrue, or not believing that it was true, or indifferent whether it was true or false, as distinguished from the case in which an untrue representation is made carelessly without the matter being present to the mind of the person making it,[6] the seller may have a right either to rescind the contract or to bring an action of deceit for damages.[7]

Rescission.

Blackburn, J., says:—[8]

"There is a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind;

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[1] Sale of Goods Act, 1893, s. 48 (4).

[2] See Chalmers on Sale, 169—185; Anson on Contracts, 369.

[3] *Lewis* v. *Jones*, 4 B. & C. 506; 28 R. R. 360.

[4] *Hopkins* v. *Tanqueray*, 15 C. B. 130, is a good example of a representation.

[5] *Behn* v. *Burness*, 3 B. & S. 751; *Kennedy* v. *Panama R. Co.*, L. R. 2 Q. B. 587 *et seq.*; *Hopkins* v. *Tanqueray*, 15 C. B. 130.

[6] *Derry* v. *Peek*, 14 App. Cas. 337; *Angus* v. *Clifford*, [1891] 2 Ch. 449; 6 Law Quarterly, 72.

[7] See notes to *Pasley* v. *Freeman*, 2 Sm. L. C. 64; and to *Chandelor* v. *Lopus*, *id.* 58.

[8] *Kennedy* v. *Panama R. Co.*, L. R 2 Q. B. 587; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price."

Condition precedent.

A condition precedent is a term of the contract, the non-fulfilment of which gives to the person for whose benefit it was inserted the right to decline to perform the contract. Examples of conditions precedent occur where the contract for sale is made at a time when the goods are not in a deliverable state and they are to be put into that state by the seller. Here their being put into that state is a condition precedent, for the buyer is not bound to accept them till this has been done.[1]

Sale by description.

In a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the goods correspond with the sample if they do not also correspond with the description.[2]

Fitness for particular purpose.

Where the buyer makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill and judgment, and the goods are such as the seller in the course of his business supplies, there is an implied condition that the goods shall be reasonably fit for that purpose.[3]

Merchantable quality.

If goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality; if, however, the buyer has examined the goods, there is no implied condition as to defects which such examination ought to have revealed.[4]

Usage of trade.

An implied condition as to quality, or fitness for a particular purpose, may be annexed by the usage of trade.[5]

Sale by sample.

When goods are sold by sample there is an implied condition, (1) that the bulk shall correspond with the sample in quality; (2) that the buyer shall have a reasonable opportunity of comparing

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[1] *Ante*, p. 46.
[2] Sale of Goods Act, 1893, s. 13.
[3] *Ib.* sect. 14 (1). *Gillespie* v. *Cheney*, [1896] 2 Q. B. 59.
[4] *Ib.* sect. 14 (2).
[5] *Ib.* sect. 14 (3).

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the bulk with the sample; and (3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.[1]

Where the contract is made subject to a condition precedent to be performed, for example, a valuation to be made by a third party, who does not make the valuation, the sale cannot take effect.[2] But if the performance of a condition becomes impossible owing to the act or default of one of the parties, the condition is considered, as against him, as having been performed.[3]

Warranty.

A warranty is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.[4]

When condition, and when warranty.

The buyer may waive a condition to be fulfilled by the seller, or may treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated.[5]

Whether a stipulation is a condition, or a warranty, depends in each case on the construction of the contract of sale, and a stipulation may be a condition, though called a warranty in the contract.[6]

When a contract of sale is not severable, and the buyer has accepted all or part of the goods, or when specific goods are sold and the property has passed to the buyer, the breach of a condition on the part of the seller can only be treated as a breach of warranty, unless there is an agreement to the contrary.[7]

Remedy for breach of warranty.

When there has been a breach of warranty, the buyer may either set up the breach in diminution or extinction of the price, or he may sue the seller for damages.[8]

Implied warranty on sale of marked goods.

It should here be noticed that, by the Merchandise Marks Act, 1887,[9] on the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor is to be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed

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[1] Sale of Goods Act, 1893, s. 15.
[2] *Ib.* sect. 9.
[3] *Mackay* v. *Dick*, 6 App. Cas. 251.
[4] Sale of Goods Act, 1893, s. 62 (1).
[5] *Ib.* sect. 11 (1a).
[6] *Ib.* sect. 11 (1b). See per Bowen, L. J., *Bentsen* v. *Taylor*, [(1893) 2 Q. B. 280.
[7] *Ib.* sect. 11 (1c).
[8] *Ib.* sect. 53.
[9] 50 & 51 Vict. c. 28, s. 17; and 54 Vict. c. 15, s. 1. See *post*, p. 217.

by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

Warranty of title.

It was for a long time doubtful to what extent there was an implied warranty on the part of the seller of goods that he had a good title thereto.[1]

Now, by the Sale of Goods Act,[2] it is provided that, in a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:—

(1) "An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell,[3] he will have a right to sell the goods at the time when the property is to pass."

(2) "An implied warranty that the buyer shall have and enjoy quiet possession of the goods."

(3) "An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

Sales by sheriffs, or forced sales by public auction, or sales of unredeemed pledges by pawnbrokers, are instances of sales which are generally made under circumstances such as to show that there is no intention to give an implied warranty.[4]

Bills of Lading.

Bill of lading defined.

Lord Blackburn says:—[5]

A bill of lading[6] is a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage (subject to such conditions as may be mentioned in the bill of lading). The bill of lading is sometimes an undertaking to deliver the goods to the shipper by name, or his assigns; sometimes to order or assigns, not naming any person, which is apparently the same thing; and sometimes to a consignee by name, or assigns, but in all its usual forms it contains the word assigns.

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[1] Benjamin on Sale, 622; *Sims* v. *Marryat*, 17 Q. B. 281; *Morley* v. *Attenborough*, 3 Ex. 512; *Eichholz* v. *Bannister*, 17 C. B. N. S. 708.

[2] Sect. 12.

[3] See *ante*, p. 45.

[4] *Chapman* v. *Speller*, 14 Q. B. 621; *Morley* v. *Attenborough*, 3 Ex. 500; *Bagueley* v. *Hawley*, L. R. 2 C. P. 625; *Ex p. Villars*, 9 Ch. 437.

[5] Blackburn on Sale, 388.

[6] See the form of a bill of lading in the Appendix.

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The bill of lading is, therefore, a written contract between those who are expressed to be parties to it, on behalf of their principals if they be agents, that is, generally speaking, between the master of the ship on behalf of his principals the shipowners, on the one part, and the person named as shipper of the goods on the behalf of the person who, at the time of shipment, was his principal, on the other part, by which it is agreed that the shipowner is to deliver the goods to the person who shall fill the character of assign.

Indorsement and delivery of bill of lading may pass property.

Goods shipped are physically incapable of delivery during the voyage; but it is a rule of the law merchant that the property in the goods *may* pass, not (as is sometimes said) that it necessarily passes,[1] by indorsement and delivery of the bill of lading.

Sets of bills.

Bills of lading are usually drawn in sets of three. If the bills are transferred to different *bonâ fide* purchasers for value, the goods pass to the purchaser who is first in point of time;[2] but the shipowner may safely deliver the goods to the person who first presents either of the set, in the absence of notice of any prior claim.[3] By the common law, although the transfer of a bill of lading might pass the property in the goods, it did not operate as an assignment of the contract expressed in the bill of lading, and therefore no right was conferred on the assignee to sue upon that contract.

18 & 19 Vict. c. 111.

This, however, was altered by the Bills of Lading Act, 1855,[4] by which, after reciting that:—

"By the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property."

it was enacted:—

Sect. 1. "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

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[1] *Sewell* v. *Burdick*, 10 App. Cas. 74; Sale of Goods Act, sect. 19 (3), *ante*, p. 48.

[2] *Barber* v. *Meyerstein*, L. R. 4 H. L. 317; *Sanders* v. *Maclean*, 11 Q. B. D. 327.

[3] *Glyn* v. *E. & W. Ind. Docks Co.*, 7 App. Cas. 591. As to the effect of the transfer of a bill of lading upon the right of stoppage *in transitu*, see *ante*, p. 63.

[4] 18 & 19 Vict. c. 111. See *Freedom* v. *Simmonds*, L. R. 3 P. C. 594.

Delivery Orders—Dock Warrants.

Delivery orders—Dock warrants.

Delivery orders,[1] dock warrants, and wharfinger's receipts are generally written authorities to deliver the possession of goods,[2] so framed that the right to possess the goods passes by indorsement and delivery of the documents. It will be noticed that, as the goods are on land, there is no reason why the indorsee should not at once produce the document to the bailee in whose possession the goods are, and take possession of the goods or require the bailee to attorn to him, *i.e.*, become his bailee. The common law, while, as we have seen, it allowed the transfer of a bill of lading to pass the property in the goods on the ground of the physical impossibility of a purchaser acquiring possession, did not attribute the like effect to a transfer of a document of the nature under consideration.

A man does not acquire possession of the goods merely by receiving a delivery order; in order to do so he must either have the goods delivered to him, or, if they are in the possession of a bailee, must procure attornment by the bailee to him,[3] and this may be effected by merely lodging the delivery order with the bailee, provided the bailee does not dissent.[4]

It should be observed that, as the transfer of a delivery order effected by indorsement and delivery only transfers the right to possess, as distinguished from possession itself, the mere fact of a person taking such a transfer does not amount to acceptance and receipt of the goods within sect. 4 of the Sale of Goods Act, 1893, until the person in whose possession the goods are consents to hold them as bailee for, or attorns to, the transferee.[5]

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[1] The form may run as follows:—"To A. B., I hereby undertake to deliver to your order endorsed hereon" (description of goods). (Signed) C. D. *Farmiloe* v. *Bain*, 1 C. P. D. 446.

[2] *Gunn* v. *Bolckow*, 10 Ch. 499.

[3] *Farina* v. *Home*, 16 M. & W. 119; *McEwan* v. *Smith*, 2 H. L. C. 309.

[4] *Pearson* v. *Dawson*, E. B. & E. 448.

[5] *Farina* v. *Home*, 16 M. & W. 119; *Bentall* v. *Burn*, 3 B. & C. 423; 27 R. R. 391, *ante*, p. 53.

CHAPTER V.

SALES, PURCHASES, AND PLEDGES BY AGENTS.[1]

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Agency, how created:

(1) by express contract:

THE relation of principal and agent may be created—

(1) By express contract, which may be either written or without writing,[2] even if the agent be appointed to sign a contract under the 4th section of the Statute of Frauds,[3] or the 4th section of the Sale of Goods Act, 1893.[4]

An agent appointed to execute a deed for another must be appointed by deed (called a power of attorney).[5]

(2) by implication:

(2) By implication, where a person is placed in such a position that, according to the ordinary usage of mankind, he would be understood to act for and represent the principal.[6]

For example, if a man puts goods into the custody of another whose common business is to sell such goods, he gives him implied authority to sell them, unless he limits his authority.[7]

Husband and wife.

Also, a wife has in many cases an implied authority to pledge her husband's credit.[8]

(3) from necessity:

Master of ship.

(3) From the necessity of the case.

On this principle, where the master of a ship[9] cannot communicate with the owner or his agent,[10] he may contract for the necessary repairs of the ship,[11] and other necessaries for the ship; and may raise money necessary for the prosecution of the voyage,[12] and

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[1] See as to contracts by agents generally, Leake, Contr. (3rd ed.), 387 *et seq.*; Pollock, Contr. (5th ed.), 92 *et seq.*

[2] *Mortlock* v. *Buller*, 10 Ves. 311; 7 R. R. 417; *Heard* v. *Pilley*, 4 Ch. 548.

[3] 29 Car. 2, c. 3; *Emmerson* v. *Heelis*, 2 Taunt. 38; *Acebal* v. *Levy*, 10 Bing. 378.

[4] Formerly sect. 17 of the Statute of Frauds.

[5] M. L. R. P. 316; Shep. Touch. 57.

[6] *Pole* v. *Leask*, 33 L. J. Ch. 155.

[7] *Pickering* v. *Busk*, 15 East, 38; 13 R. R. 364.

[8] See *Debenham* v. *Mellon*, 6 App. Cas. 24, and notes to *Manby* v. *Scott*, 2 Sm. L. C. 433.

[9] See Chap. VIII., p. 117.

[10] *Gunn* v. *Roberts*, L. R. 9 C. P. 331.

[11] *Webster* v. *Seekamp*, 4 B. & Ald. 352; 23 R. R. 307.

[12] *Beldon* v. *Campbell*, 6 Ex. 886; *Arthur* v. *Barton*, 6 M. & W. 138; *The Mariposa*, [1896] P. 273.

for these purposes may pledge the credit of the shipowner. A wife living apart from her husband may in some cases pledge his credit for necessaries.[1]

(4) By ratification. If A., unauthorized by B., makes a contract on his behalf with C., which contract B. subsequently adopts, A. becomes B.'s agent *ab initio*. (4) by ratification.

In this case, if C. entered into the contract believing that he was contracting with B., and B. subsequently admits that such is the case, C. is precisely in the position in which he intended to be. If C. intended to contract with A., he retains his remedy against him, and is not injured by the ratification.[2] B. may ratify an acceptance by A. of an offer by C., even though C. has endeavoured to withdraw the offer before the ratification.[3]

There is a distinction between an agent who has a general authority to do things of a certain nature and one who is employed *pro hâc vice*, who is, in other words, a special agent. "General" and "special" agent.

An agent of the former class has the right to do all acts which are incident to his general authority; and, unless the person dealing with him has notice that his authority is limited, *i.e.*, that he has no authority to do some of these acts, the principal is bound by such acts of the agent.[4] On the other hand, a special agent with only a limited authority cannot bind his principal by an act beyond the scope of his authority.[5]

For example, if a horse-dealer having a horse to sell directs his salesman to sell it, but not to warrant it, and the salesman warrants it, the master will be bound by the warranty, because the salesman is acting within the general scope of his authority; and the public cannot be supposed to be cognizant of any private communication between his master and him.[6] But if a private person, being the owner of a horse, directs his servant to sell the horse, but not to warrant him, and he does warrant him, the owner is not bound, because the servant was not acting within the scope of his authority.[7]

Where an agent, either general or special, has authority to sell, Agent to sign contract.

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[1] See notes to *Manby* v. *Scott*, 2 Sm. L. C. 433.

[2] *Bird* v. *Brown*, 4 Ex. 786; *Maclean* v. *Dunn*, 4 Bing. 722; 29 R. R. 714.

[3] *Bolton* v. *Lambert*, 41 Ch. D. 295; *Re Portuguese Mines*, 45 Ch. D. 16.

[4] *Collen* v. *Gardner*, 21 Beav. 540; *Smith* v. *M'Guire*, 3 H. & N. 554; *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346.

[5] *Fenn* v. *Harrison*, 3 T. R. 757; *Attwood* v. *Munnings*, 7 B. & C. 278; 31 R. R. 194.

[6] *Howard* v. *Sheward*, L. R. 2 C. P. 148.

[7] *Brady* v. *Todd*, 9 C. B. N. S. 592.

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he has authority to make the contract for sale binding; and therefore, in cases falling within sect. 4 of the Sale of Goods Act, 1894,[1] he can sign a note in writing of the contract so as to bind his principal.

Authority may be given to sign a note of a contract already made, without giving authority to make a contract, or to vary one already made. This distinction is of importance where an error is made in reducing the contract into writing. In such cases, if the agent has authority to make a contract, the writing containing the mistake is the note of a contract within the authority of the agent, and the principal is bound by it; but where the authority is only to sign the note of a particular contract, the writing containing the mistake is not one that the agent is authorized to sign, and therefore the principal is not bound by it.[2] One of the parties to a contract cannot be the agent of the other for the purpose of signing it.[3]

Agent contracting in his own name.

Where a man who is in fact an agent contracts in his own name without qualification, he is a contracting party;[4] but, if words are used which plainly show that he is contracting not for himself but for someone else, effect will be given to them whether they are contained in the body of the instrument or are annexed to his signature.[5]

Auctioneer.

An auctioneer[6] is a person employed by the vendor as his agent to sell, and therefore to sign the contract for sale, on his behalf. The highest bidder at the sale by the act of bidding[7] constitutes the auctioneer his agent for the purpose of signing the contract contained in the written conditions of sale. The auctioneer's clerk may be, and very often is, the agent of the purchaser to sign for him.[8] The signature must be at the time of the sale and not afterwards.[9]

The owner may withdraw the property,[10] and the bidder may

[1] 56 & 57 Vict. c. 71. Formerly sect. 17 of the Statute of Frauds.

[2] Blackburn on Sales, 73.

[3] *Sharman* v. *Brandt*, L. R. 6 Q. B. 720. See the rule doubted in Blackburn on Sales, 72.

[4] *Higgins* v. *Senior*, 8 M. & W. 844.

[5] *Fairlie* v. *Fenton*, L. R. 5 Ex. 169; *Gadd* v. *Houghton*, 1 Ex. D. 357. See notes to *Thomson* v. *Davenport*, 2 Sm. L. C. 378.

[6] *Ante*, p. 57.

[7] *Emmerson* v. *Heelis*, 2 Taunt. 38; 11 R. R. 520; *White* v. *Proctor*, 4 Taunt. 209; 13 R. R. 580.

[8] *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Sims* v. *Landray*, [1894] 2 Ch. 318; *Bell* v. *Balls*, [1897] 1 Ch. 663.

[9] *Mews* v. *Carr*, 1 H. & N. 484; *Bell* v. *Balls*, *sup.*

[10] *Warlow* v. *Harrison*, 1 E. & E. 295.

withdraw his bid, which is a mere offer,[1] at any time before the bargain is concluded by the fall of the hammer.

In order to make a valid memorandum of the contract within sect. 4 of the Sale of Goods Act, 1893, the document that the auctioneer signs must contain all the terms of the contract; so that, if he simply writes down the name of the purchaser and the price in a book which does not incorporate the conditions, it is not sufficient.[2] Each lot is *primâ facie* the subject of a separate contract for sale.[3]

Where a sale of goods by auction is not expressed to be subject to a reserve price, or to the right of the seller to bid, it is not lawful for him or any person authorized by him (who is called a puffer) to bid.[4] But the sale may be expressly made subject to a reserved price or to the right of the seller or a puffer to bid.[5]

An auctioneer who sells goods in the ordinary way, generally has the possession of them, and is liable as a bailee.[6] He can sue for the price in his own name,[7] and has a lien for the purchase-money;[7] his authority is to receive payment in cash only.[8] If the goods do not belong to the vendor, the auctioneer is liable, as for a conversion of the goods, at the suit of the real owner.[9]

Brokers.

A broker for sale is a person having authority both from buyer and seller to sign a memorandum of the bargain so as to make the contract good against each.[10] He also finds buyers and sellers and negotiates between them.[11] In many cases he is originally employed by one party with special instructions as to price; and, in these cases, though he cannot act as the agent of the other party in fixing the price, there is no objection to his acting for both parties in seeing that they understand the contract and that it is made binding,[12] or to his signing for the party who did not employ

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[1] *Payne* v. *Cave*, 3 T. R. 148; 1 R. R. 679; Sale of Goods Act, 1893, s. 58 (2).

[2] *Hinde* v. *Whitehouse*, 7 East, 558; 8 R. R. 676; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Kenworthy* v. *Schofield*, 2 B. & C. 945; 26 R. R. 600; *Rishton* v. *Whatmore*, 8 Ch. D. 467.

[3] *Emmerson* v. *Heelis*, 2 Taunt. 38; 11 R. R. 520; *Roots* v. *Dormer*, 4 B. & Ad. 77; Sale of Goods Act, 1893, s. 58 (1).

[4] *Bexwell* v. *Christie*, Cowp. 395; *Crowder* v. *Austin*, 3 Bing. 368; 28 R. R. 646; *Green* v. *Baverstock*, 14 C. B. N. S. 204; Sale of Goods Act, 1893, s. 58 (3).

[5] *Ib.* s. 58 (4).

[6] *Ante*, p. 23.

[7] *Williams* v. *Millington*, 1 H. Bl. 81; 2 R. R. 724; *Woolfe* v. *Horne*, 2 Q. B. D. 355.

[8] *Pape* v. *Westacott*, [1894] 1 Q. B. 272.

[9] *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495.

[10] Blackburn on Sale, 18.

[11] *Janssen* v. *Green*, 4 Burr. 2103; *Smith* v. *Lindo*, 4 C. B. N. S. 395; *Scott* v. *Jackson*, 19 *Id.* 134.

[12] Blackburn on Sale, 79.

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him to fix the price if authorized by him to do so.[1] A broker has neither the custody nor the possession of the goods to be sold,[2] nor can he sue in his own name on a contract made by him as broker.[3]

As a general rule, a person employing a broker must be taken to have authorized him to act as brokers generally act; and the person who treats with a broker has a right to assume that he has such authority, and to consider the principal bound by all acts falling within such authority.[4] If a principal wishes to limit the authority of a broker, so as not to authorize him to do the acts generally done by brokers, he must give notice of such limitation to the other person with whom he wishes to contract through the broker.

Custom of the market.

The authority of the broker depends upon the custom of the trade, which had originally to be ascertained by evidence; but, when a trade has been long established, its customs will be taken judicial notice of.[5]

Where a principal employs a broker to buy or sell for him in a market of the usage of which he is ignorant, he authorizes him to make a contract upon the footing of such usages as are reasonable and do not alter the character of the contract, but not on the footing of unreasonable usages. If, however, he knows the usage, he is bound by it even if it be unreasonable.[6]

Signed entry in broker's book.

Where a contract is entered into through the intervention of a broker, he reduces it into writing, and ought to sign and deliver a copy to each party, and he generally enters it in a book which he keeps for that purpose. The entry in the book, when signed by the broker, is a sufficient memorandum of the contract to satisfy sect. 4 of the Sale of Goods Act.[7]

"Sold" and "bought" notes.

The copy of the contract given to the seller is called the "sold note," and that given to the buyer the "bought note." The sold and bought notes may constitute a sufficient memorandum in writing of the contract to satisfy the above-mentioned statute.[8]

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[1] See *Thompson* v. *Gardiner*, 1 C. P. D. 777.

[2] *Baring* v. *Corrie*, 2 B. & Ald. 137; 20 R. R. 383.

[3] *Fairlie* v. *Fenton*, L. R. 5 Ex. 169.

[4] *Heyworth* v. *Knight*, 17 C. B. N. S. 298.

[5] *Brandao* v. *Barnett*, 12 Cl. & F. 787.

[6] *Robinson* v. *Mollett*, L. R. 7 H. L. 802; *Perry* v. *Barnett*, 15 Q. B. D. 388. See notes to *Wigglesworth* v. *Dallison*, 1 Sm. L. C. 535.

[7] *Thompson* v. *Gardiner*, 1 C. P. D. 777; *Sievewright* v. *Archibald*, 17 Q. B. 103.

[8] *Thompson* v. *Gardiner*, *sup.*

There are three different forms of bought and sold notes.

Three forms of note.

In the first form the sold note runs as follows:—"Sold for A. to B." (here follow the terms of the contract), while the bought note is "Bought for B. from A." (here follow the terms of the contract). In such cases the names of both seller and buyer appear on each note.

In the second form the sold note omits the name of the buyer, and the bought note the name of the seller.

Where the notes are in the first form, each by itself is a complete memorandum of the bargain within the statute, so that the only question that can be raised by a person who denies that he is bound by the contract is whether the broker signed as his agent. It appears to be clear that the production of one note, with evidence that the other was duly delivered, is sufficient evidence that the broker signed as agent for each party;[1] but the effect of the production of one note, where the other is not in evidence, has not been determined; the doubt being whether the authority of the broker to bind either party by his signature is not conditional on his delivering a note to him.[2]

Where the notes are in the second form, each note is incomplete in itself, for it does not contain the names of both parties. But, as both the form of the note and the custom of the trade show that there ought to be another note, it is sufficient if the other note can be proved to exist; but if it is not proved to exist, the point is doubtful.[3]

Where the notes are in either of the above forms, the broker expressly contracts as agent, though, where they are in the second form, he does not disclose the name of his principal. In effect he says, "I am contracting with you for a principal." But there is another form of note which is made out by the broker in his own name so as to pledge his personal credit. In this third case the sold note is in the form "Bought of you by me"; and the bought note is "Sold to you by me." In this case, the mere fact that he adds the word "broker" to his signature is not sufficient to enable him to repudiate his personal liability.[4]

Personal liability of broker.

Where the note is in the third form, there is some difficulty in seeing how the principal can sue, or be sued; in other words, how it can be said that the contract contained in the notes is the

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[1] *Hawes* v. *Forster*, 1 M. & Rob. 368.

[2] Consider *Thompson* v. *Gardiner*, *sup.*

[3] Blackburn on Sale, 86.

[4] *Hutcheson* v. *Eaton*, 13 Q. B. D. 861.

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contract of the principal. However, it is settled law that, on the one hand, the broker cannot deny his liability,[1] and that, on the other hand, evidence is admissible to show that he contracted for an undisclosed principal, that is, to show that the principal contracted through the broker.[2]

It is hardly necessary to say that, whatever be the form of the notes, no contract can be established where the bought and sold notes differ in their terms; as, for instance, where they vary in the description of the goods, or as to the time at which payment is to be made.[3]

Factor.

"A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale; and he usually sells in his own name without disclosing that of his principal; the latter therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods and gives him authority to sell in his own name."[4] It follows that special instructions given to the factor, restrictive of his apparent authority, do not affect a purchaser, unless communicated to him.[5] A factor has authority to sell on the usual terms of credit;[6] to receive and give receipts for the price;[7] but he had not at common law authority to pledge the goods.[8] And his authority might be revoked at any time before the goods were sold.[9]

Repealed Factors Acts.

Alterations in the law were made in 1823, 1825, 1842, and 1877,[10] by Acts known as the "Factors Acts." These Acts have been repealed and re-enacted with amendments, as regards England and Ireland, but not Scotland, by the Factors Act, 1889.[11]

Factors Act, 1889.

The effect of the Act is that, where a "mercantile agent" is in the possession, by himself or his bailee, of goods, or documents of title

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[1] *Higgins* v. *Senior*, 8 M. & W. 834.

[2] *Trueman* v. *Loder*, 11 A. & E. 589. See notes to *Thomson* v. *Davenport*, 2 Sm. L. C. 378.

[3] *Grant* v. *Fletcher*, 5 B. & C. 436; 29 R. R. 286; *Sievewright* v. *Archibald*, 17 Q. B. 103; *Thornton* v. *Kempster*, 5 Taunt. 786; 15 R. R. 658; *Gregson* v. *Ruck*, 4 Q. B. 737.

[4] Per Abbott, C. J., *Baring* v. *Corrie*, 2 B. & Ald. 143.

[5] *Ex p. Dixon*, 4 Ch. D. 133; *Stevens* v. *Biller*, 25 Ch. D. 31. *Ante*, p. 74.

[6] *Scott* v. *Surman*, Willes, 407; *Houghton* v. *Matthews*, 3 Bos. & P. 489; 7 R. R. 815.

[7] *Drinkwater* v. *Goodwin*, Cowp. 255; *Fish* v. *Kempton*, 7 C. B. 687.

[8] *Graham* v. *Dyster*, 6 M. & S. 1. *Ante*, p. 27.

[9] *Raleigh* v. *Atkinson*, 6 M. & W. 670.

[10] 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39.

[11] 52 & 53 Vict. c. 45 (printed in Appendix). Discussed in Chalmers on Sale, 122 *et seq.*

to goods, with the consent of the owner, any sale, pledge, or other disposition made by him, in the ordinary course of his business as mercantile agent,[1] is as valid in favour of a person dealing *bonâ fide* as if he were expressly authorized to make it, and notwithstanding that his authority has been determined;[2] and similar provisions are contained in respect of dealings by a seller[3] who remains in possession, or a buyer or person who has agreed to buy[4] and has obtained possession of the goods or documents of title.[5]

Del credere agent.

A "*del credere*" agent guarantees to his principal the solvency of the person with whom he contracts. If, for instance, he be a broker for sale, or a factor, he undertakes to pay for the goods that he sells if the purchaser fails to pay for them.[6] A *del credere* commission is "the premium or price given by the principal to the factor for a guarantee."[7] An agreement to sell upon a *del credere* commission need not be in writing, as it is not a promise to answer for the debt, default, or miscarriage of another person within the 4th section of the Statute of Frauds.[8]

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[1] 52 & 53 Vict. c. 45, s. 1; *Hastings* v. *Pearson*, [1893] 1 Q. B. 62.

[2] *Ib.* sect. 2.

[3] *Ib.* sect. 8; Sale of Goods Act, 1893, s. 25 (1).

[4] 52 & 53 Vict. c. 45, s. 9. *Shenstone* v. *Hilton*, [1894] 2 Q. B. 452; *Helby* v. *Matthews*, [1895] A. C. 471; Sale of Goods Act, 1893, s. 25 (2).

[5] *Hugill* v. *Masker*, 22 Q. B. D. 364.

[6] *Ex p. White*, 6 Ch. 397; *Grove* v. *Dubois*, 1 T. R. 112; 16 R. R. 664.

[7] Per Lord Ellenborough, *Morris* v. *Cleasby*, 4 M. & S. 574; 16 R. R. 544.

[8] *Couturier* v. *Hastie*, 8 Ex. 40; *Wickham* v. *Wickham*, 2 K. & J. 478.

CHAPTER VI.

GIFTS.

Gifts inter vivos.

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A GIFT,[1] by which we mean a transfer of property without valuable consideration to a donee, who accepts the property, is liable to be defeated by the creditors of the donor either under the statute of Elizabeth[2] or on his bankruptcy.[3]

Gifts and assignments for value distinguished.

There is a broad distinction between an assignment for value and a gift. In the former case, if the transfer of the property is for any reason imperfect, we have to consider the intentions of two persons—of the person who makes and of the person who takes under the assignment; and if it appears that both intended that a perfect assignment should be made, the Court will compel the assignor to do everything that may be necessary to perfect the assignment.

In the case of a gift, the nature of the transaction depends entirely on the will of the donor. If he does something which does not really amount to a complete transfer of the property to the donee, we have no reason to suppose that he intended to do anything more than he actually did. He may perhaps at one time have intended to make a gift; but the very fact of his not having completely transferred the property may show that if he ever had that intention he subsequently altered his mind. These considerations lead to the cardinal rule that an imperfect gift creates no right that can be enforced; in other words, that a person cannot be compelled to do anything to perfect a gift by

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[1] It should be observed that, in the Year Books, "*done*," which is generally translated "gift," does not necessarily imply that there was no consideration; compare the phrases "donee" in tail, "to give" in tail, where, if the reversion is retained by the donor, there is necessarily consideration, owing to the tenancy created.

[2] 13 Eliz. c. 5; *post*, p. 93; M. L. R. P. 110.

[3] *Post*, Chap. XVIII.

him.[1] There is a *locus pœnitentiæ* so long as it is incomplete.[2] But the subsequent conduct of the donor may enable the donee to compel the donor to perfect the gift; as, for example, if A. gives a piece of land to B. without making a formal conveyance, and B., to A.'s knowledge, builds upon it.[3]

No gift unless— (1) complete transfer, or declaration of trust;

Where it is alleged that a transaction amounts to a gift, two questions arise, viz.:—

(1.) Was there a complete transfer of the property according to its nature? If the donor intended to give the legal estate, has everything necessary to vest it in the donee been done? if the equitable only, has a trust of the property for the benefit of the donee been validly constituted? An ineffectual attempt to pass the legal ownership (contrary to the usual rule of construction *ut res magis valeat*) will not be construed to operate as the creation of a valid trust.

(2) intention to give.

(2.) With what intention was the transfer made?

A man may make a voluntary transfer of property, but not intend to make a gift of it. He may intend that the transferee should hold it as his trustee. The intention that the transfer should operate as a gift may be proved by the acts as well as by the words of the donor.

Milroy v. *Lord.*

The principles that we have stated are laid down very clearly by Turner, L.J., in his judgment in *Milroy* v. *Lord*.[4] He says:—

"I take the law of this Court to be well settled that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there

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[1] See this discussed in Vaizey on Settlements, 92 *et seq.*

[2] *Antrobus* v. *Smith*, 12 Ves. 39; 8 R. R. 278; *Edwards* v. *Jones*, 1 My. & Cr. 226; *Lyte* v. *Peny*, Dyer, 49*a*.

[3] Per Westbury, C., *Dillwyn* v. *Llewelyn*, 4 De G. F. & J. 521; *Re Barker*, 44 L. J. Ch. 490.

[4] 4 De G. F. & J. 274.

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is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be effectual by being converted into a perfect trust."[1]

What constitutes a gift—acceptance.

A promise to make a gift in the future does not amount to a gift, and is merely *nudum pactum*.[2]

A gift cannot be made unless the donee is ascertained[3] and is capable of taking;[4] he is not bound to accept it;[5] but, if it is made by deed, it vests in him till he repudiates the gift;[6] and acceptance is presumed until dissent is signified.[7]

Infants.

An infant can accept a gift,[8] but he can repudiate it when he comes of age.[9] A common example of the right of an infant to repudiate a gift on his attaining twenty-one is afforded by the transfer to or purchase in the name of an infant of shares in a company. He can repudiate them on attaining twenty-one, and if the company is wound up before that event happens his transferor remains liable for calls.[10]

Gifts on condition.

A gift may be made subject to a condition precedent[11] or to a condition subsequent. Gifts subject to conditions subsequent must be carefully distinguished from gifts for a particular purpose. Gifts of the latter class take effect even if the purpose becomes incapable of being performed.

In *Scott* v. *Haughton*,[12] Mrs. Fuller gave some lottery tickets to her servants on condition that, if 20*s.* or more should come up, her daughter should have a moiety of it. A ticket given to an infant

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[1] See also *Richards* v. *Delbridge*, 18 Eq. 14.

[2] *Shower* v. *Pilck*, 4 Ex. 478; *Re Ridgway*, 15 Q. B. D. 449.

[3] Y. B. 11 H. 7, 12, pl. 4; *Paston and Genney's Case*, 11 Ed. 4, 2, pl. 2; Bro. Ab. *Done*, 31; *Roberts* v. *Roberts*, 11 Jur. N. S. 992.

[4] *Haynes's Case*, 12 Rep. 113; 3rd Instit. 110.

[5] *Hill* v. *Wilson*, 8 Ch. 893; Y. B. 7 Ed. 4, 29, pl. 14; *Lyte* v. *Peny*, Dyer, 49*a* (8).

[6] Y. B. 7 Ed. 4, 20, pl. 21; *Standing* v. *Bowring*, 31 Ch. D. 282.

[7] See *London and County Bank* v. *London, &c. Bank*, 21 Q. B. D. 541.

[8] *Hunter* v. *Westbrook*, 2 C. & P. 578; *Haynes's Case*, 12 Rep. 113; *The Wardens of the Minor Brothers of London*, Y. B. 11 H. 4, 31.

[9] Co. Litt. 2*b*.

[10] *Weston's Case*, 5 Ch. 614; *Mann's Case*, 3 Ch. 459; *Curtis's Case*, 6 Eq. 455.

[11] *Lyte* v. *Peny*, Dyer, 49*a*, (7); *Re Whittaker*, 21 Ch. D. 657.

[12] 2 Vern. 560.

servant produced £1,000, and it was held that the infant was bound to perform the condition.

The most common example of a gift being liable to be defeated by a condition subsequent is that of presents made by a man to a woman to whom he is betrothed,[1] in which case, if the marriage is broken off, the presents must be returned; on the other hand, presents made to a woman to obtain introduction to her are not revocable.[2]

An example of the rule that a gift is not defeated by the failure of the purpose for which it is made is afforded by *Leche* v. *Kilmorey*,[3] where A. paid a sum to an army agent to the account of N. "to be at his disposal for the use of L." The sum was really intended by the donor to be applied in purchasing promotion for L. At the death of A. the money still remained in the hands of the army agent. Afterwards L. was obliged, from his bad health, to leave the army, and it was held that he was entitled to the money.

Gifts by deed.

A gift of specific chattels by deed[4] vests the chattels in the donee without delivery of them to him, subject, of course, to his right to refuse the gift.[5] "If the deed be delivered to the use of the donee, the goods and chattels are in the donee presently before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested."[6] It is now settled that, "although a donee may dissent from and thereby render null a gift to him, yet a gift to him of property, whether real or personal, by deed, vests the property in him subject to his dissent."[7] And acceptance is presumed until dissent is signified, even though the donee is not aware of the gift.[8]

Acceptance presumed until dissent.

Creditors' deed.

The cases[9] which show that a voluntary assignment made by a debtor to a trustee for his creditors is revocable by the grantor until it has been communicated to a creditor, are not authorities for the proposition that a gift by deed is revocable until it is com-

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[1] *Young* v. *Burrell*, Cary, 77; *Robinson* v. *Cumming*, 2 Atk. 409.

[2] *Robinson* v. *Cumming*, *sup.*

[3] Turn. & Russ. 207.

[4] It may be a bill of sale within the meaning of the Bills of Sale Acts; *post*, Chap. VII.

[5] Y. B. 7 Ed. 4, 20, pl. 21.

[6] *Butler and Baker's Case*, 3 Rep. 26*b*, 27*a*.

[7] Per Lindley, L. J., *Standing* v. *Bowring*, 31 Ch. D. 290.

[8] Per Lindley, L. J., *London and County Bank* v. *London &c. Bank*, 21 Q. B. D. 541.

[9] Collected in *Siggers* v. *Evans*, 5 E. & B. 367.

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municated to the donee. The distinction between the two cases is obvious. In the case of the creditors' deed, the debtor is merely directing how his own property is to be applied for his own benefit.[1] The deed has merely the same effect as if the debtor had delivered money to an agent to pay his creditors, in which case the debtor might, before payment or communication by the agent to the creditors, change his mind and recall the money: in the case of a gift, the effect of the deed is actually to change the ownership of the property for the benefit of the donee.[2]

The operation of a deed is not suspended by its being suppressed or destroyed by the donor, or by its not being communicated to the donee; and it may be good as between the donor and donee without notice to trustees, which may be necessary to render it good against third parties.[3] The deed must, of course, be one which is effective to pass the property in law or equity.[4]

Parol gift—delivery is necessary.

The question whether a gift of a corporeal chattel in the possession of the donor can be made without delivery, *per verba de præsenti*, or by the expression of the intention of the parties, as evidenced by their acts, has been the subject of much controversy.[5] It has, however, been decided by the Court of Appeal,[6] in accordance with *Irons* v. *Smallpiece*,[7] that delivery[8] is essential. Fry and Bowen, L.JJ.,[9] in their judgment said:—

"According to the old law no gift or grant of a chattel was effectual to pass it either by parol or by deed, and whether with or without consideration, unless accompanied by delivery. On that law two exceptions have been grafted, one in the case of deeds and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery; but as regards gifts by parol the old law was in force when *Irons* v. *Smallpiece* was decided; that case, therefore, correctly declared the existing law."

Lord Esher, M.R., said:—

"In ordinary English language, and in legal effect, there cannot be a gift without a giving and taking. The giving and taking are the

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[1] See *Acton* v. *Woodgate*, 2 My. & K. 492.

[2] *New* v. *Hunting*, [1897] 2 Q. B. 19.

[3] Elph. N. & C. Interp. 120; Byth. & Jarm. Conv. by Robbins, vol. ii. p. 264; *Standing* v. *Bowring*, 31 Ch. D. 282; *post*, p. 127.

[4] Per Grant, M. R., *Antrobus* v. *Smith*, 12 Ves. 39; 8 R. R. 878.

[5] See *Re Harcourt*, 31 W. R. 580; *Re Ridgway*, 15 Q. B. D. 449.

[6] *Cochrane* v. *Moore*, 25 Q. B. D. 57.

[7] 2 B. & Ald. 551; 21 R. R. 395.

[8] *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582. As to what amounts to delivery, see *ante*, p. 15.

[9] *Cochrane* v. *Moore*, *sup.*

two contemporaneous reciprocal acts which constitute a gift. They are a necessary part of the proposition that there has been a gift. They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift." [1]

There must be a delivery, transfer, or change of possession consequent upon the gift.[2]

The word "contemporaneous," as used by Lord Esher, must probably be taken in the qualified meaning of "as part of the same transaction." There are some cases in which the intention of the donor to make the gift, the delivery to and the acceptance by the donee, take place at different times. For example, A. sends a book as a present to his son in India; the son is away from his house at the time when the book is delivered there, and does not know of the intended gift till he returns to his house. In this case acceptance follows delivery; but it may precede it, as where A. offers to give a specific chattel to B., B. accepts, and A. delivers it afterwards. Probably an offer by A. to give a specific chattel to B. when accepted by B. operates as a licence to B. to take that chattel peaceably wherever he may find it, and the taking of it by B. operates as delivery by A. so as to transfer the property in the chattel to B. The licence, however, is revocable until executed, and may be revoked by a communication to that effect made by A. to B., or by A.'s death, or probably by A.'s becoming insane.[3]

Chattel in possession of bailee or trespasser.

Where a corporeal chattel is in the hands of a bailee or trespasser, the owner may wish to give it either to the person in whose possession it is, or to a stranger. In the former case, an expression of the intention of the owner to give the chattel to the person in whose possession it is, followed by acceptance of the gift, appears to be sufficient. In other words, a delivery, followed by a subsequent declaration of intention to give, has the same effect as a declaration of intention to give followed by delivery.[4] Such is the common case of A. lending a book to B., and afterwards telling him that he may keep it.[5]

The law as to gifts to trespassers (*i.e.*, persons who acquire possession wrongfully) is laid down in Sheppard's Touchstone[6] as follows:—

"If a man take my goods from me, or from another man in whose

[1] *Cochrane* v. *Moore*, *sup.*

[2] *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582. See *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, per Lord Esher, M. R., and Davey, L. J.

[3] See this discussed, 6 Law Quarterly, 446.

[4] Y. B. 21 Ed. 4, 55, pl. 27.

[5] 6 Law Quarterly, 449.

[6] Pp. 240, 241.

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hands they are; or I buy goods of another man and suffer them in his possession, and a stranger taketh them from him; it seems, in these cases, I may give the goods to the trespasser, because the property of them is still in me." Mr. Preston adds, "*i. e.*, his acceptance of them is an admission of property in the donor; but they cannot be given to a stranger, since without such an admission the party has merely a right of action or of resumption by recaption."[1]

Where A. expresses an intention to give to B. a specific chattel in the possession of a bailee, C., it appears on principle (for the case does not appear to have been decided) that if C. agrees with A. and B. to hold the chattel as bailee for B., or if C. at A.'s request delivers the chattel to B., the gift becomes perfect. The former of these propositions is not irreconcileable with *Cochrane* v. *Moore*.[2] There Benzon bailed a horse to Yates, and then gave to Moore by words of present gift, and Moore accepted, one quarter of the horse. Benzon told Yates of the gift to Moore, but Moore did not know of his having done so; and it was held that the intended gift was ineffectual. This case does not fall within the proposition above stated, for Yates never agreed with Moore to become his bailee.

Gift of negotiable instrument.

The delivery of a negotiable instrument (*post*, p. 186) to the donee, indorsed if necessary by the donor, operates as a gift of the money secured by it if such be the intention.[3]

There is, however, a distinction between a cheque drawn by the donor on his own bankers in favour of the donee, and a cheque drawn by a stranger and given by the donor to the donee. The former is merely an order by the donor to his banker to pay the donee, and is revocable by the donor, and is revoked by his death at any time before payment.[4] On the other hand, the delivery of a cheque drawn by a stranger passes the right to receive the money for which the cheque is drawn, and therefore operates as an effectual

[1] This statement of the law appears to be founded on the Y. B. 6 Hen. 7, 8, pl. 4, and 10 Hen. 7, 27, pl. 13. In the latter case a man from whom goods were taken by a trespasser gave them to him, and it was held that the gift was good, and that even if it was not good as a gift it was good as a release, for chattels may be released without deed. The statement in *Jennor and Hardie's Case*, 1 Leon. 283, pl. 383, that a release of a right in chattels cannot be without deed, appears from the context to be erroneous.

[2] 25 Q. B. D. 57.

[3] *McCulloch* v. *Bland*, 2 Giff. 428; *Langley* v. *Thomas*, 26 L. J. Ch. 609.

[4] See sect. 75, Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). The decision in *Bromley* v. *Brunton*, 6 Eq. 275, seems not to be in accordance with principle or authority.

gift. But a negotiable instrument does not pass by words of gift without delivery.[1]

Gift of instrument creating chose in action.

Where a chose in action is (or was formerly) assignable in equity only (*post*, p. 126), the delivery of the instrument creating it does not pass the money secured, and that, notwithstanding that there may be an informal assignment in writing, or strong evidence of intention to make the gift.[2] It must not, however, be assumed that the gift of the instrument has no effect. Coke says:—[3]

> "A man may give or grant his deed to another, and such a grant by parol is good. . . . . If a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz., the parchment and wax, to another, who may cancel and use the same at his pleasure."

The donee may often retain the instrument, though he cannot recover the debt; and in such cases the donor, or his representative, may be unable to recover the debt for want of the instrument.[4]

Deeds.

Where, however, an equitable mortgagee by deposit of deeds hands over the deeds to a donee, the donee cannot retain them, because the donor had no property in them apart from the charge, and could only transfer the ownership of them by properly transferring the charge.[5]

Gift of instrument to debtor.

The gift to the debtor of an instrument creating a debt, after the debt is due, does not extinguish the debt.[6] In the case of a bill or note, however, either a written renunciation, or a verbal renunciation and delivery of the bill or note to the acceptor or maker, discharges the debt.[7]

Cancellation.

The cancellation of an instrument is *primâ facie* evidence of a release.[8] The intentional cancellation of a bill or note, or of the

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[1] *Trimmer* v. *Danby*, 25 L. J. Ch. 424; *Bridge* v. *Bridge*, 16 Beav. 315.

[2] *Howes* v. *Prudential Assurance Co.*, 49 L. T. N. S. 133; *Rummens* v. *Hare*, 1 Ex. D. 169; *Barton* v. *Gainer*, 3 H. & N. 387; *Edwards* v. *Jones*, 1 My. & Cr. 226; *Patterson* v. *Williams*, L. & Goo. Ca. temp. Plunk. 95; *Searle* v. *Law*, 15 Sim. 95.

[3] Co. Litt. 232*a*, *b*.

[4] *Rummens* v. *Hare*, 1 Ex. D. 169; *Barton* v. *Gainer*, 3 H. & N. 387; *Howes* v. *Prudential Co.*, 49 L. T. 133; *Edwards* v. *Jones*, 1 My. & Cr. 226.

[5] *Re Richardson*, 30 Ch. D. 396.

[6] *Edwards* v. *Walters*, [1896] 2 Ch. 157, 168. See also *Byrn* v. *Godfrey*, 4 Ves. 5; *Cross* v. *Sprigg*, 6 Hare, 552; *Re Hancock*, 57 L. J. Ch. 793.

[7] Bills of Exchange Act, 1882, ss. 62, 89; *Edwards* v. *Walters*, *sup.*

[8] *Pigot's Case*, 11 Co. Rep. 26 b; *Harrison* v. *Owen*, 1 Atk. 520; *Alsager* v. *Close*, 10 M. & W. 576; *Gilbert* v. *Wetherell*, 2 Sim. & S. 254; 25 R. R. 203.

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signature of a party thereto, by the holder discharges the bill or note or the party whose signature is cancelled.[1]

Forgiveness of debt.

Except as above, the mere fact of a creditor forgiving a legal debt, either by word of mouth,[2] or by writing not under seal,[3] does not discharge the debtor. If the debt, being a simple contract debt, is not due, the contract might at law be rescinded by a new simple contract, but forgiveness cannot amount to a contract; if the debt is due, it can only be released by deed, or by simple contract made upon an executed consideration by way of accord and satisfaction.[4] Mere forgiveness will not suffice, because the defence to an action for the recovery of the debt could at most be equitable only,[5] and equity will not assist a volunteer. But, if the debt is gone at law, as where the debtor is appointed executor of the creditor, so that he requires no assistance from equity, the forgiveness operates as a release in equity and at law.[6]

Release of debt by conduct.

Whether the instrument creating the debt is under seal or not, the conduct of the parties may amount to a release of the debt.[7]

Assignment under Judicature Act.

The provision of the Judicature Act, 1873,[8] that "any absolute assignment by writing under the hand of the assignor . . . of any debt or other legal chose in action of which express notice in writing shall be given to the debtor . . . shall be effectual at law . . . to pass and transfer the legal right to such debt or chose in action from the date of such notice . . . " applies to a voluntary transfer.

Chose in action transferable in statutory mode.

A gift of a *chose in action* which is transferable in a statutory manner only (*post*, pp. 130, 132) is not effectual unless the transfer is made in the statutory manner.[9]

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[1] Bills of Exchange Act, 1882, ss. 63, 89.

[2] *Flower's Case*, Noy, 67.

[3] But consider *Eden* v. *Smyth*, 5 Ves. 356; 5 R. R. 60, where it was considered that a bond debt might be released by a letter.

[4] Leake on Contracts, p. 795. As to accord and satisfaction, see *post*, p. 156.

[5] *Cross* v. *Sprigg*, 6 Ha. 552; *Peace* v. *Hains*, 11 Ha. 151; *Knapp* v. *Burnaby*, 8 W. R. 305.

[6] *Strong* v. *Bird*, 18 Eq. 315; *Re Applebee*, [1891] 3 Ch. 422.

[7] *Flower* v. *Marten*, 2 My. & Cr. 459; *Major* v. *Major*, 1 Drew. 165; *Yeomans* v. *Williams*, 35 Beav. 130; 1 Eq. 184; *Edwards* v. *Walters*, [1896] 2 Ch. 157, 168.

[8] 36 & 37 Vict. c. 66, s. 25, sub-s. 6. See *post*, p. 133.

[9] *Colman* v. *Sarrel*, 1 Ves. 50; 3 Bro. C. C. 12; 1 R. R. 83; *Beech* v. *Keep*, 18 Beav. 285 (where consols were assigned by deed); *Coningham* v. *Plunkett*, 2 Y. & C. C. C. 245; *Peckham* v. *Taylor*, 31 Beav. 250 (where a power of attorney for the transfer of stock was executed, but no transfer made during the donor's

Gift of equitable interest in property by way of trust.

It is possible to make a valid gift of the equitable interest in property of any nature by means of a trust. If the donor has the legal interest he may constitute himself a trustee for the donee, or transfer the legal interest to some other person as a trustee for the donee. In the former case, he may retain some control over the thing given without rendering the gift ineffectual.[1] If the donor has the equitable interest only, he can cause the holder of the legal interest to constitute himself a trustee for the donee. The cases are conflicting, but the following conclusions may be drawn from them:—

First. Where the donor attempts to make a gift by transfer of the property to the donee which fails owing to the transfer being ineffectual, he does not thereby constitute himself a trustee.[2]

Secondly. The owner of property may constitute himself[3] or a stranger[4] a trustee for a donee by unequivocal words or actions.[5]

Thirdly. Where A., the legal owner of property, attempts to make a gift to B. by transferring it to C. in trust for B., the gift fails if the transfer is incomplete.[6]

Fourthly. Where A. is the equitable owner of property legally vested in C., a direction by A. to C. to hold the property in trust for B. (assented to by C.) operates as an effectual gift in equity to B.[7]

Statute of Frauds, ss. 7, 8, 9.

It must be remembered, however, that the Statute of Frauds[8] enacts that "all declarations or creations of trusts or confidences of any *lands*, *tenements*, or *hereditaments* shall be manifested or proved by some writing signed by the party who is by law enabled to

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life); see also *Searle* v. *Law*, 15 Sim. 95; *Antrobus* v. *Smith*, 12 Ves. 39; 8 R. R. 278; *Dillon* v. *Coppin*, 4 My. & Cr. 647; *Moore* v. *Moore*, 18 Eq. 474; *Milroy* v. *Lord*, 4 De G. F. & J. 264.

[1] *Wheatley* v. *Purr*, 1 Keen, 551; *Vandenberg* v. *Palmer*, 4 K. & J. 204.

[2] See *Milroy* v. *Lord*, and *Richards* v. *Delbridge*, cited *supra*, p. 79.

[3] *Exp. Pye*, 18 Ves. 140; 2 W. & T. L. C. 366; 11 R. R. 173; *Wheatley* v. *Purr*, 1 Keen, 551; *Thorpe* v. *Owen*, 5 Beav. 224; *Gray* v. *Gray*, 2 Sim. N. S. 273.

[4] *Tate* v. *Leithead*, Kay, 658; *Peckham* v. *Taylor*, 31 Beav. 250; *Stapleton* v. *Stapleton*, 14 Sim. 186; *Vandenberg* v. *Palmer*, 4 K. & J. 204.

[5] No trust was constituted in *Gaskell* v. *Gaskell*, 2 Y. & J. 502; *Hughes* v. *Stubbs*, 1 Ha. 476; *Smith* v. *Warde*, 15 Sim. 56; *Mews* v. *Mews*, 15 Beav. 529; *Field* v. *Lonsdale*, 13 Beav. 78; *Re Glover*, 2 J. & H. 186; *Peckham* v. *Taylor*, 31 Beav. 250; *Jones* v. *Lock*, 1 Ch. 25; *Penfold* v. *Mould*, 4 Eq. 562.

[6] See per Romilly, M. R., *Bentley* v. *Mackay*, 15 Beav. 18.

[7] *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Villers* v. *Beaumont*, 1 Vern. 100; *Ellison* v. *Ellison*, 6 Ves. 656; 6 R. R. 19; *Rycroft* v. *Christy*, 3 Beav. 238; *Bentley* v. *Mackay*, *sup.*; *Harding* v. *Harding*, 17 Q. B. D. 442.

[8] 29 Car. 2, c. 3.

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declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect";[1] and that "all grants and assignments of *any* trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall be utterly void and of none effect."[2] Trusts arising or resulting by implication or construction of law, or transferred or extinguished by operation of law, are excepted from the operation of sect. 7.[3]

Purchase in name of stranger.

Where a man purchases property in the name of a stranger, or in the name of a stranger jointly with himself, the presumption is that he makes the purchase for his own benefit.[4] On the other hand, if he purchases property in the name of a person whom he is morally bound to provide for, the presumption is that he intends the purchase to discharge in whole or in part his moral obligation; but in either case evidence is admissible to rebut the presumption.[5]

In the opinion of Courts of Equity a father is morally bound to provide for his children, and a husband for his wife;[6] but if it is alleged that a person standing in any other relation to another is morally bound, as being *in loco parentis*, to support him, the existence of the obligation must be proved.[7]

Father and child.

It follows that if a father makes a purchase in the name of a child,[8] or in the names of the child and another person,[9] or in the names of the child and himself,[10] the purchase is considered to be for the child's benefit. It may, however, appear, either from evidence of the father's declarations or conduct, contemporaneous with but not after the purchase,[11] or by the acts or declarations of

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[1] 29 Car. 2, c. 3, s. 7.

[2] Sect. 9.

[3] Sect. 8. See *Dyer* v. *Dyer*, 1 W. & T. L. C. 308.

[4] *Dyer* v. *Dyer*, 2 Cox, 92; 2 W. & T. L. C. 803; *Rider* v. *Kidder*, 10 Ves. 360; *Standing* v. *Bowring*, 31 Ch. D. 287, per Cotton, L. J.

[5] *Bennet* v. *Bennet*, 10 Ch. D. 476.

[6] See *Marshal* v. *Crutwell*, 20 Eq. 328.

[7] Per Jessel, M. R., *Bennet* v. *Bennet*, 10 Ch. D. 476.

[8] *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Mumma* v. *Mumma*, 2 Vern. 19; *Taylor* v. *Taylor*, 1 Atk. 386; *Grey* v. *Grey*, 2 Swanst. 594; 19 R. R. 150; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Williams* v. *Williams*, 32 Beav. 370; *Hepworth* v. *Hepworth*, 11 Eq. 10; *May* v. *May*, 33 Beav. 81.

[9] *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; *Crabb* v. *Crabb*, 1 My. & K. 511.

[10] *Scroope* v. *Scroope*, 1 Ch. Ca. 27; *Back* v. *Andrews*, Finch, Pre. Ch. 1.

[11] *Elliot* v. *Elliot*, *sup.*; *Woodman* v. *Morrel*, Freem. Ch. Ca. 32; *Birch* v. *Blagrave*, 1 Amb. 264; *Murless* v. *Franklin*, 1 Swan. 13; 18 R. R. 3; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Christy* v. *Courtenay*, 13 Beav. 96; *Dumper* v. *Dumper*, 3 Giff. 583; *Williams* v. *Williams*, *sup.*; *Stock* v. *McAvoy*, 15 Eq. 55;

the child after the purchase,[1] or by the circumstances attending the transfer, that the child was merely a trustee for his father.

Mother and child.

On the other hand, as a mother is not considered by Courts of Equity to be morally bound to provide for her children, a transfer to, or a purchase in the name of a child by its mother is *primâ facie* not a gift to the child;[2] but circumstances may readily[3] show that it was a gift.[4]

A purchase in the name of a grandchild whose father was dead,[5] or in the name of a wife's nephew whose father was alive,[6] was held under the circumstances to be made by a person who was morally bound to support the person in whose name the purchase was made, and therefore to amount to a gift.

Husband and wife.

Until recently a gift by a husband to his wife had no effect at law, though equity would give effect to it as raising a trust.[7] Now, however, under the Conveyancing Act, 1881, and the Married Women's Property Act, 1882, such a gift is effectual at law.[8]

A purchase by a husband in the name of his wife, or in the joint names of the husband and wife,[9] or in the names of the husband, wife, and a stranger,[10] is presumed to be a gift to the wife, but this presumption may be rebutted.[11]

Prankerd v. *Prankerd*, 1 Sim. & S. 1; 24 R. R. 142; *Collinson* v. *Collinson*, 3 De G. M. & G. 409; *Bone* v. *Pollard*, 24 Beav. 283; *Childers* v. *Childers*, 1 De G. & J. 482.

[1] *Sidmouth* v. *Sidmouth*, 2 Beav. 455; *Pole* v. *Pole*, 1 Ves. sen. 76; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.

[2] *Re De Visme*, 2 De G. J. & S. 17; *Bennet* v. *Bennet*, 10 Ch. D. 474; *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

[3] Per Jessel, M. R., *Bennet* v. *Bennet*, *sup.*

[4] *Sayre* v. *Hughes*, 5 Eq. 376; *Batstone* v. *Salter*, 19 Eq. 250; 10 Ch. 431.

[5] *Ebrand* v. *Dancer*, 2 Ch. Ca. 26; *Soar* v. *Foster*, 4 K. & J. 152.

[6] *Currant* v. *Jago*, 1 Coll. 261.

[7] *Fox* v. *Hawks*, 13 Ch. D. 822.

[8] 44 & 45 Vict. c. 41, s. 50; 45 & 46 Vict. c. 75; *Re Breton*, 17 Ch. D. 416.

[9] *Christ's Hospital* v. *Budgen*, 2 Vern. 683; *Lorimer* v. *Lorimer*, 10 Ves. 367, n.; *Dummer* v. *Pitcher*, 2 My. & K. 262; *Low* v. *Carter*, 1 Beav. 426; *Drew* v. *Martin*, 2 H. & M. 130; *Gosling* v. *Gosling*, 3 Drew. 335. Keeping a joint banking account has the same effect; see *Re Young*, 28 Ch. D. 705. Where it was agreed that money standing to an intended wife's credit at a bank should be her separate property, and after the marriage she drew it out, it was held that the husband had given it to her; *Re Whitehead*, 14 Q. B. D. 419.

[10] *Kingdon* v. *Bridges*, 2 Vern. 67; *Re Eykyn*, 6 Ch. D. 115.

[11] *Smith* v. *Warde*, 15 Sim. 56; *Lloyd* v. *Pughe*, 8 Ch. 88; *Devoy* v. *Devoy*, 3 Sm. & Giff. 403. Wedding presents are separate estate of the wife; *Ex p. Pannell*, 37 W. R. 464. See Vaizey on Settlements, 760, 783.

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A purchase in the name of a stranger may be proved to be a gift by evidence of intention[1] or of circumstances.[2]

A woman who has gone through the ceremony of marriage with a man who knows the marriage to be invalid,[3] or a woman living in adultery with a man,[4] or a man's illegitimate child,[5] is a stranger to the man, within the meaning of the rule.

Donationes Mortis Causâ.

A *donatio mortis causâ*[6] is where a man makes a gift in contemplation of his death from an existing illness.[7] It is subject to a condition (which may be express or implied) that the thing given shall be returned to the donor if he recovers,[8] and is revoked by the death of the donee in the lifetime of the donor,[9] or by the thing given being returned to the donor,[10] and is subject to the donor's debts.[11] A *donatio mortis causâ* may be made for a particular purpose or subject to a trust.[12] A gift which is intended to be an unconditional gift *inter vivos* cannot take effect as a *donatio mortis causâ*.[13]

The form of a will of personalty made before the Wills Act[14] came into operation was immaterial, so that an instrument of any nature intended to operate after a man's death might be admitted

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[1] *Beecher* v. *Mayor*, 2 Dr. & Sm. 431; *Standing* v. *Bowring*, 27 Ch. D. 341; 31 Ch. D. 282; *Batstone* v. *Salter*, 19 Eq. 250; 10 Ch. 431; *Fowkes* v. *Pascoe*, 10 Ch. 343; *George* v. *Howard*, 7 Pri. 646; 21 R. R. 775; *Deacon* v. *Colquhoun*, 2 Drew. 21.

[2] *Re Curteis*, 14 Eq. 217; *Ouseley* v. *Anstruther*, 10 Beav. 461.

[3] *Soar* v. *Foster*, 4 K. & J. 152.

[4] *Rider* v. *Kidder*, 10 Ves. 360.

[5] *Tucker* v. *Burrow*, 2 H. & M. 515; but see *Beckford* v. *Beckford*, Lofft, 490.

[6] The doctrine as to *donationes mortis causâ* is derived from the civil law. "Mortis causâ donatio est quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accipit: sin autem supervixisset is qui donavit, reciperet: vel si eum donationis pœnituisset: aut prior decesserit is, cui donatum sit:" Just. Instit. II. 7, 1. See *Ward* v. *Turner*, 1 W. & T. L. C. 390, and notes.

[7] *Duffield* v. *Elwes*, 1 Bli. N. S. 530; *Tate* v. *Hilbert*, 2 Ves. jun. 121; 4 Bro. C. C. 290; *Cosnahan* v. *Grice*, 15 Moo. P. C. 215.

[8] *Tate* v. *Hilbert*, 2 Ves. jun. 121; 4 Bro. C. C. 290; 2 R. R. 175; *Hedges* v. *Hedges*, Pre. Ch. 269; Gilb. 12; 2 Vern. 615; *Ashton* v. *Dawson*, 2 Coll. 363, n.; *Staniland* v. *Willott*, 3 Mac. & G. 664.

[9] *Tate* v. *Hilbert*, 2 Ves. jun. p. 120; 2 R. R. 175.

[10] *Ward* v. *Turner*, 2 Ves. sen. p. 433.

[11] *Smith* v. *Casen*, cited *Drury* v. *Smith*, 1 P. Wms. 406, n.; *Tate* v. *Leithead*, Kay, 659; *Ward* v. *Turner*, *sup.*

[12] *Blount* v. *Burrow*, 4 Bro. C. C. 73; *Hills* v. *Hills*, 8 M. & W. 401; *Dunne* v. *Boyd*, 8 Ir. Rep. Eq. 609.

[13] *Edwards* v. *Jones*, 1 My. & Cr. 226; *Reddel* v. *Dobree*, 10 Sim. 244; *ante*, p. 79.

[14] 7 Will. 4 & 1 Vict. c. 26.

to probate.[1] The consequence was that where a man made a gift by writing to take effect after his death, it took effect, if it took effect at all, as a legacy, not as a *donatio mortis causâ*. The consequence might be different if in addition to the instrument there was delivery. The rule that a *donatio mortis causâ* cannot be made by writing appears not to have been altered by the Wills Act.[2]

Delivery necessary.

A *donatio mortis causâ* cannot be made by mere words.[3] It can only be made effectual by delivery.[4] This does not mean that the delivery must be such as to confer a legal title on the donee, for in some cases the delivery of a document of title, which does not pass a legal interest, is held to confer an equitable interest on the donee, and the right to the assistance of the Court to make his title complete after the death of the donor.[5] The delivery may be made to the donee or to a bailee for him;[6] but delivery to the agent of the donor, with directions to deliver to the donee after the death of the donor, is not sufficient.[7] There may, however, be a good *donatio mortis causâ* of a thing which has been previously delivered for a different purpose.[8] Delivery of the key of a safe in which bonds were kept was held to effectuate a *donatio mortis causâ* of the bonds.[9]

Negotiable instruments.

Delivery of a negotiable instrument to the donee is sufficient,[10] even if it requires indorsement and is not indorsed.[11]

A *donatio* of a cheque drawn by the donor is ineffectual unless it be cashed[12] or dealt with for value[13] in his lifetime.

Delivery of the instrument creating a chose in action, such as a deposit note,[14] is sufficient, and after the death of the donor the donee can sue in the name of his executors.[15] The same rule has

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[1] See the cases collected, Williams on Executors, Pt. I., B. II. Chap. II. s. 3.

[2] 7 Will. 4 & 1 Vict. c. 26.

[3] Per Loughborough, C., *Tate* v. *Hilbert*, *sup.*

[4] *Ward* v. *Turner*, 2 Ves. sen. 431; 1 W. & T. L. C. 390; *Bunn* v. *Markham*, 7 Taunt. 224; 17 R. R. 497.

[5] *Duffield* v. *Elwes*, 1 Bli. N. S. 530; *Re Dillon*, 44 Ch. D. 76.

[6] *Powel* v. *Cleaver*, 2 Bro. C. C. 499.

[7] *Powell* v. *Hellicar*, 26 Beav. 261; *Farquharson* v. *Cave*, 2 Coll. 356.

[8] *Cain* v. *Moore*, [1896] 2 Q. B. 283.

[9] *Mustapha* v. *Wedlake*, (1891) W.N. 201.

[10] *Powel* v. *Cleaver*, 2 Bro. C. C. 500; *Miller* v. *Miller*, 3 P. W. 356.

[11] *Veal* v. *Veal*, 27 Beav. 303; *Re Mead*, 15 Ch. D. 651; *Clement* v. *Cheesman*, 27 Ch. D. 631.

[12] *Hewitt* v. *Kay*, 6 Eq. 198; *Re Mecd*, 15 Ch. D. 651. See Byles on Bills, 201.

[13] *Rolls* v. *Pearce*, 5 Ch. D. 730. Dealing with the cheque for value would seem to be the same thing as cashing it at the donor's bank; the money would remain subject to the condition.

[14] *Re Dillon*, 44 Ch. D. 76.

[15] *Snellgrove* v. *Baily*, 3 Atk. 214; *Gardner* v. *Parker*, 3 Mad. 184; 18 R. R. 213; *Amis* v. *Witt*, 33 Beav. 619; *Witt* v. *Amis*, 1 B. & S. 109.

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been applied to the delivery of a receipt which was the evidence of a loan.[1]

Delivery up of a mortgage deed to the mortgagor, as a *donatio mortis causâ*, was held to be effectual to extinguish the mortgage debt, and the heir and executor of the mortgagee were held bound to give effect to it.[2]

It has been held that bank shares and railway stock cannot be the subject of *donatio mortis causâ*.[3]

It is now settled that there is no rule which requires that the evidence of a person making a claim against the estate of a deceased must be corroborated, though such evidence ought to be very carefully sifted.[4]

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[1] *Moore* v. *Darton*, 4 De G. & Sm. 517.

[2] *Duffield* v. *Hicks*, 1 Dow & Cl. 1; S. C., *Duffield* v. *Elwes*, 1 Bli. N. S. 497; see *Re Dillon*, *sup.*

[3] *Lambert* v. *Overton*, 13 W. R. 227; *Moore* v. *Moore*, 18 Eq. 474. The effect of giving a power of attorney to transfer stock is doubtful; *Kiddell* v. *Farnell*, 26 L. J. Ch. 818; *Peckham* v. *Taylor*, 31 Beav. 250. For other cases as to what can be the subject of *donatio mortis causâ*, see 1 W. & T. L. C. 390.

[4] *Re Dillon*, *sup.*; *Re Garnett*, 31 Ch. D. 1; *Re Applebee*, [1891] 3 Ch. 422; *Eyre* v. *Wynne Mackenzie*, [1894] 1 Ch. 225.

CHAPTER VII.

BILLS OF SALE.

A BILL OF SALE, in its ordinary popular meaning, is a document whereby the legal property in chattels is transferred to a person who lends money upon the security thereof, when the possession does not pass; but the term "bill of sale" properly denotes any instrument whereby the property in chattels is transferred, whether absolutely or by way of mortgage;[1] and, where there is valuable consideration for the transfer, the instrument need not be a deed.[2] A mortgage of chattels is to be distinguished from a pledge or pawn; under the latter the possession is given to the person who lends money on the chattels.[1]

Mortgage and pledge distinguished.

Where the bill of sale is by way of mortgage, the property passes to the grantee subject either to a condition making the transfer void on performance of the condition, as by the payment of money, or to a proviso entitling the grantor to redeem the property by such payment, and thereupon to have it reconveyed to him.

Personal property in general passes by delivery of possession,[3] and the possession of such property is an apparent indication of ownership. If a purchaser or mortgagee of chattels allows them to remain in the possession of the vendor or mortgagor, the latter is enabled to appear to the world at large as the owner of the property, and to obtain credit as such;[4] and on this ground it was held in many cases that transactions were fraudulent as against creditors, by virtue of the statute 13 Eliz. c. 5.[5] That Act avoids, as against creditors, any alienation of lands, goods, or chattels made with intent to delay, hinder, or defraud creditors;

Apparent possession.

13 Eliz. c. 5.

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[1] *Mills* v. *Charlesworth*, 25 Q. B. D. 421, 424; [1892] A. C. 231; *Grigg* v. *National, &c. Co.*, [1891] 3 Ch. 206. *Ante*, p. 40.

[2] *Flory* v. *Denny*, 7 Ex. 581.

[3] *Ante*, pp. 15, 40.

[4] See per Plumer, M. R., *Dearle* v. *Hall*, 3 Russ. 22; 27 R. R. 1.

[5] Made perpetual by 29 Eliz. c. 5; *Twyne's Case*, 3 Rep. 80; 1 Sm. L. C. 1.

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but the Act does not affect *bonâ fide* purchasers for value without notice.[1]

It is, however, now settled law that the retention of possession by the grantor of chattels is only evidence of fraud, and not conclusive proof of it:[2] and there is this distinction to be observed between absolute sales and mortgages, that, on an absolute sale, the retention of possession by the vendor is *primâ facie* inconsistent with the nature of the transaction; whereas retention of possession by a mortgagor is consistent with a transaction of mortgage.[3] It is sufficient for the security of a mortgagee that he should have a right to take possession of the mortgaged property upon default made by the mortgagor in performing his obligations under the bill of sale; and it was usual in mortgage bills of sale to provide expressly that until default the mortgagor should remain in possession.

Secret alienations of chattels.

If a transfer of chattels was made *bonâ fide*, and was not a contrivance to defraud creditors, it was unimpeachable under the 13 Eliz. c. 5, even where the transaction was secret, and the grantor remained in possession of the chattels and appeared to the world to be their owner. Persons were thus enabled "to obtain fictitious credit, which their real circumstances did not warrant, by retaining apparent possession of goods, the ownership of which they had parted with to others, but which appeared to be really their own by remaining in their possession—a course of proceeding calculated to prejudice the honest creditor."[4] Where a debtor became bankrupt or insolvent, a remedy was provided by successive Bankruptcy Acts, which, in such cases, have made available, for the benefit of the debtor's creditors generally, all goods which were in his "possession, order, or disposition," in his trade or business, at the commencement of the bankruptcy, by the consent or permission of the true owner, a term which was construed to include a mortgagee,[5] and of which the debtor was reputed owner.[6]

Reputed ownership under Bankruptcy Acts.

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[1] See M. L. R. P. pp. 110 *et seq.*

[2] *Martindale* v. *Booth*, 3 B. & Ad. 498.

[3] See per Buller, J., *Edwards* v. *Harben*, 2 T. R. 587, 595; 1 R. R. 548; *Cook* v. *Walker*, 3 W. R. 357.

[4] Per Cockburn, C. J., *Brantom* v. *Griffits*, 2 C. P. D. 212, 214.

[5] *Ryall* v. *Rowles*, 1 Ves. sen. 348; S. C., 1 W. & T. L. C. 96. See *post*, Chap. XVIII.

[6] 21 Jac. 1, c. 19, ss. 10, 11; 6 Geo. 4, c. 16, s. 72; 12 & 13 Vict. c. 106, s. 125; 32 & 33 Vict. c. 71, s. 15 (5); 46 & 47 Vict. c. 52, s. 44 (iii) (Bankruptcy Act, 1883, now in force). See per Lord Fitzgerald, in *Colonial Bank* v.

Object of Bills of Sale Acts.

But, except as above mentioned, the danger to creditors of transfers of the property in personal chattels by secret bills of sale was not provided against until the year 1854, when the first Bills of Sale Act (17 & 18 Vict. c. 36) was passed, the object being to destroy the secrecy of such transactions by requiring bills of sale to be recorded in a register, open to inspection on payment of a small fee, and by providing that, unless so registered, they should be void as against the general creditors on the bankruptcy or insolvency of the grantor and as against his execution creditors.

Lord Blackburn has given the following account of the causes which led to the enactments known as the Bills of Sale Acts:—[1]

"At common law, a man might take a security upon goods without carrying away the goods, or taking possession of them; he might take a sale of them out and out, and he might take the legal property in them subject to the power to redeem them (what is commonly called a mortgage) without taking possession of them. The law on the subject will be found in *Twyne's Case*,[2] and the notes upon *Twyne's Case*.[3] But this rule got established, that, when the goods were not taken away, but were left in the hands of the man who had had them previously, that which had been thought before to make the transaction void was really no more than evidence to go to the jury of fraud; and if a man came forward suddenly, when there was an execution, for instance, issued against the person in possession of the goods, and said, 'At an antecedent time I had a security upon these goods, and I left them in the possession of the debtor all that time,' the not having taken possession was evidence that the thing was a sham; it was not conclusive; it was not a matter of law; but it was evidence that the thing was a sham. Upon that two evils arose, and very important ones they were. In the first place, it often happened that there was really a sham put up to endeavour to defeat a man, and there was a great quantity of perjury, of fighting and expense, before it was proved to be a sham. That was a great evil. The other was that there were real honest transactions which were asserted to be shams when they were not, and in those cases there was apt to be much perjury, and great expense before it was decided. For these reasons it was thought, and reasonably and properly so, that it was desirable to put a stop to this. That was the beginning of the series of Bills of Sale Acts, the first of which was passed in 1854."

Bills of Sale Act, 1854.

The preamble of the Bills of Sale Act, 1854,[4] sets forth that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up

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Whinney, 11 App. Cas. 442, on the "order and disposition" and "reputed ownership" clauses. See also 2 Vaizey on Settlements, 1554 *et seq.*

[1] *Cookson* v. *Swire*, 9 App. Cas. 664.

[2] 3 Rep. 80.

[3] 1 Sm. L. C. 1.

[4] 17 & 18 Vict. c. 36.

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the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors." The Act then proceeded to enact that every bill of sale[1] of personal chattels,[1] whether absolute or conditional, whereby the grantee or holder should have power to seize or take possession of any property comprised therein, should be registered in the manner mentioned in the Act within twenty-one days after the making or giving of the bill of sale; and, if not so registered, should be void as against the grantor's assignees in bankruptcy or insolvency, and as against the assignees under any assignment for the benefit of his creditors, and as against all sheriff's officers and other persons seizing the effects in execution of any process against the grantor, so far as regarded personal chattels in the possession or apparent possession of the grantor. By an amending Act of 1866,[2] the registration was required to be renewed every five years.

Bills of Sale Acts, 1878, 1882, as to "personal chattels."

The Acts of 1854 and 1866 were repealed in 1878, and the law now in force is contained in the Bills of Sale Acts, 1878, 1882, 1890 and 1891,[3] except as regards bills of sale executed before the 1st of January, 1879.[4]

These Acts relate only to "personal chattels," which expression, according to the Act of 1878,[5] means—

Definition of "personal chattels."

"Goods, furniture, and other articles capable of complete transfer by delivery, and (when separately[6] assigned or charged) fixtures and growing crops."

But does not include:—[7]

Property exempted from Act.

"Chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incor-

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[1] These terms are defined by sect. 7 of the Act.

[2] 29 & 30 Vict. c. 96.

[3] 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35. As to the sale under a bill of sale of crops, manure, &c., on lands in lease, see 56 Geo. 3, c. 50, s. 11.

[4] 41 & 42 Vict. c. 31, ss. 2, 23.

[5] *Ib.* sect. 4. Ships are not within the Act, *post*, p. 110.

[6] See sect. 7; *Roberts* v. *Roberts*, 13 Q. B. D. 794, 806; *Re Armytage*, 14 Ch. D. 379; *Re Yates*, 38 Ch. D. 112; *Climpson* v. *Coles*, 23 Q. B. D. 465; *Small* v. *Nat. Prov. Bank*, [1894] 1 Ch. 686; *Re Brooke*, [1894] 2 Ch. 600.

[7] Sect. 4.

porated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale."

Trade machinery.

"Trade machinery" is personal chattels for the purposes of the Act, and means "the machinery used in or attached to any factory or workshop," with certain specified exceptions.[1] There is also a full definition of "factory or workshop."[1]

The Act of 1878 applies to "every bill of sale . . . whereby the holder has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject" thereto.[2]

The expression "bill of sale" is defined by the Act of 1878[3] for the purposes of that Act; and the same definition is incorporated in the Act of 1882, subject to the qualification that the latter Act does not apply to bills of sale "given otherwise than by way of security for the payment of money."[4] It includes[5]—

"Bill of sale" defined.

"Assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement,[6] whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred."

The following documents are excluded from both Acts,[7] namely:—

Documents excluded from Bills of Sale Acts.

"Assignments for the benefit of the creditors of the person making or giving the same,[8] marriage settlements,[9] transfers or assignments of any ship or vessel or any share thereof,[10] transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, ware-

[1] 41 & 42 Vict. c. 31, s. 5.

[2] *Ib.* sect. 3.

[3] *Ib.* sect. 4.

[4] 45 & 46 Vict. c. 43, s. 3.

[5] 41 & 42 Vict. c. 31, s. 4.

[6] Not being a parol agreement; *Ex p. Hauxwell*, 23 Ch. D. 626. See also *Jarvis* v. *Jarvis*, 69 L. T. 412.

[7] 41 & 42 Vict. c. 31, s. 4; 45 & 46 Vict. c. 43, s. 3.

[8] *I.e.*, of *all* the creditors; *Boldero* v. *London and Westminster Loan Co.*, 5 Ex. D. 47; *Hadley* v. *Beedom*, [1895] 1 Q. B. 646.

[9] This includes informal ante-nuptial agreements for a settlement; *Wenman* v. *Lyon*, [1891] 1 Q. B. 634; affirmed, [1891] 2 Q. B. 192; but a post-nuptial settlement must be registered; *Ashton* v. *Blackshaw*, 9 Eq. 510.

[10] *Gapp* v. *Bond*, 19 Q. B. D. 200.

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house keepers' certificates, warrants or orders for the delivery of goods,[1] or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

And[2]

"An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being re-shipped for export, or delivered to a purchaser not being the person giving or executing such instrument."

Attornment clauses and powers of distress.

The Act of 1878 further provides[3] that every attornment, instrument or agreement (not being a mining lease)[4] whereby a power of distress is given by way of security for any debt or advance, and whereby any rent is made payable as a mode of providing for payment of interest on such debt or advance, shall be deemed to be a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress.[5] This provision does not, however, extend "to any mortgage of any estate or interest in any land . . . which the mortgagee, being in possession, shall have demised to his mortgagor as his tenant at a fair and reasonable rent."[3] It does not apply to the landlord's power of distraining for rent under an ordinary lease;[6] but it does apply to an attornment clause in a mortgage of real property,[7] though it does not render the clause void so as to destroy the relation of landlord and tenant created thereby.[7]

What constitutes a bill of sale.

A document, to be a bill of sale to which the Acts apply, must be a document on which the title of the transferee of the chattels depends, that is, one by which it is intended that the ownership shall be practically changed or a right to take possession conferred.[8]

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[1] *Grigg* v. *National, &c. Co.*, [1891] 3 Ch. 206.

[2] The Bills of Sale Act, 1891 (54 & 55 Vict. c. 35), amending the Bills of Sale Act, 1890 (53 & 54 Vict. c. 53).

[3] 41 & 42 Vict. c. 31, s. 6.

[4] See *Re Roundwood Co.*, [1897] 1 Ch. 373.

[5] See *Pulbrook* v. *Ashby*, 56 L. J. Q. B. 376; *Stevens* v. *Marston*, 60 L. J. Q. B. 192; *Re Roundwood Co.*, [1897] 1 Ch. 373.

[6] *Re Willis*, 21 Q. B. D. 384, 394; *Re Roundwood Co.*, *sup.*

[7] *Mumford* v. *Collier*, 25 Q. B. D. 279; *Green* v. *Marsh*, [1892] 2 Q. B. 330. See form and note in 2 K. & E. 156; and also 34 S. J. 704, 716.

[8] *Ex p. Hubbard*, 17 Q. B. D. 690; *North Central Co.* v. *M. S. & L. R. Co.*, 35 Ch. D. 191; 13 App. Cas. 554; *Mills* v. *Charlesworth*, [1892] A. C. 231; *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18; *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352.

The fact that the whole transaction is reduced into writing does not of itself make the document a bill of sale so as to avoid the transaction, though under such circumstances it may be necessary to produce the document in order to prove the transaction.[1] If the title of the transferee is by virtue of the transaction, and not under the document, the document is not a bill of sale.[1]

An agreement, in an ordinary building contract, that all building and other materials brought by the builder upon the land shall become the property of the landowner, is not a bill of sale;[2] but a mortgage of land and buildings in course of erection thereon, which gives the mortgagee power, on default by the mortgagor, to seize and sell materials, is a bill of sale.[3]

Hire-purchase agreements.

The Acts relate to assurances, assignments, or rights to seize given or conferred by the person who owns the property.[4] Therefore a hire-purchase agreement, under which the property in the goods does not pass until final payment and the seller has a right to retake possession on default in payment, is not a bill of sale.[4] Where, however, the owner of goods purports to sell or assign them to another, and then enters into a hire-purchase agreement under which the goods are again to become his property on payment of the agreed amount, the Court will inquire into the real nature of the transaction and decide accordingly whether the document is or is not a bill of sale.[5]

Attestation.

Every bill of sale to which the Acts apply must be duly attested and registered.[6] In the case of bills of sale under the Act of 1878, the attestation must be by a solicitor, and it must state that, before the execution of the bill of sale, its effect was explained to the grantor by the solicitor.[7] This provision as to attestation has been repealed, by the Act of 1882, as to bills of sale given as security for the payment of money,[8] but still applies to all bills of sale which are within the Act of 1878 and not within that of 1882.[9] Bills of sale within the Act of 1882 must be attested by a credible witness not a party thereto.[10]

[1] See note,[8] *sup.* p. 98.

[2] *Reeves* v. *Barlow*, 12 Q. B. D. 436.

[3] *Climpson* v. *Coles*, 23 Q. B. D. 465.

[4] *McEntire* v. *Crossley*, [1895] A. C. 457; *Ex p. Crawcour*, 9 Ch. D. 419.

[5] *Re Watson*, 25 Q. B. D. 27; *Madell* v. *Thomas*, [1891] 1 Q. B. 230; *Beckett* v. *Tower, &c. Co.*, *Id.* 638.

[6] 41 & 42 Vict. c. 31, s. 8; 45 & 46 Vict. c. 43, s. 8.

[7] 41 & 42 Vict. c. 31, s. 10 (1); *Casson* v. *Churchley*, 53 L. J. Ch. 335.

[8] 45 & 46 Vict. c. 43, s. 10.

[9] *Swift* v. *Pannell*, 24 Ch. Div. 210; *Casson* v. *Churchley*, *sup.*; *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547.

[10] 45 & 46 Vict. c. 43, s. 10.

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Registration.

Registration is effected by presenting to the Registrar, at the Central Office of the Supreme Court, the bill of sale, together with a true copy thereof and an affidavit of the time of the bill being made or given, and of its due execution and attestation, and a description of the residence and occupation of the grantor and of every attesting witness, and by filing with him the copy and affidavit.[1] This must be done within seven days of the execution thereof, or, if executed out of England, within seven days of the time at which it would in ordinary course arrive in England if posted immediately after execution.[2] The registration must be renewed once at least every five years or it will become void.[3] A transfer or assignment of a registered bill need not be registered.[4] If, by inadvertence, a bill of sale is not duly registered or re-registered, a judge of the High Court may extend the time for registration or order the registration to be amended, but not so as to affect the vested rights of third parties.[5] Priority is given in the order of the date of registration.[6]

Local registration.

In the case of bills of sale within the Act of 1882, if the grantor resides, or the goods are described as being in a district outside London, the registrar must transmit an abstract of the bill of sale to the County Court of such district, where it will be filed.[7]

Defeasance, condition, or declaration of trust.

Any defeasance, condition, or declaration of trust, subject to which a bill of sale is given, must, if not contained in the body thereof, be written on the same paper therewith before registration and be set out in the copy filed on registration, otherwise the registration will be void.[8]

Statement of consideration.

The Act of 1878 requires that a bill of sale "shall set forth the consideration" for which it was given;[9] and the Act of 1882 contains the same provision with the addition of "truly" before "set forth."[10] The effect of both is the same.[11] It is sufficient if

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[1] 41 & 42 Vict. c. 31, ss. 10, 12; R. S. C. Ord. LXI. rr. 1, 25—27. See *Simmons* v. *Woodward*, [1892] A. C. 100; *Sims* v. *Trollope*, [1897] 1 Q. B. 24.

[2] 41 & 42 Vict. c. 31, ss. 8, 10; 45 & 46 Vict. c. 43, ss. 8, 11, 15.

[3] 41 & 42 Vict. c. 31, s. 11.

[4] *Ib.* sects. 10, 11. See *Ex p. Turquand*, 14 Q. B. D. 636.

[5] *Ib.* sect. 14. See *Re Parsons*, [1893] 2 Q. B. 122.

[6] *Ib.* sect. 10.

[7] 45 & 46 Vict. c. 43, s. 11.

[8] 41 & 42 Vict. c. 31, s. 10 (3); *Counsell* v. *L. & W. Co.*, 19 Q. B. D. 512; *Edwards* v. *Marcus*, [1894] 1 Q. B. 587; *Ellis* v. *Wright*, 76 L. T. 522; *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547; *Thomas* v. *Searles*, [1891] 2 Q. B. 408.

[9] 41 & 42 Vict. c. 31, s. 8.

[10] 45 & 46 Vict. c. 43, s. 8.

[11] *Richardson* v. *Harris*, 22 Q. B. D. 268, 274.

the statement of the consideration is substantially accurate, if its true legal effect or its true business effect is stated.[1] For instance, if a bill of sale is given to secure an existing debt, the consideration may be stated as money "now paid" to the grantor.[2]

Effect of non-compliance with above provisions, under—Act of 1878;

If the provisions as to attestation, registration, and statement of the consideration are not complied with, a bill of sale within the Act of 1878 is void only as against the trustee in bankruptcy, or the trustee of an assignment for the benefit of creditors, or an execution creditor, of the grantor, in respect of the chattels comprised therein, which are in the apparent possession of the grantor at the time of the bankruptcy, assignment, or execution.[3] As between the parties it will remain valid.[4]

Act of 1882.

The effect of non-compliance with the above provisions is very different in the case of a bill of sale within the Act of 1882, that is, one given "by way of security for the payment of money,"[5] for then the bill of sale is absolutely void, even as between the parties, "in respect of the personal chattels comprised therein."[6]

Further requirements under Act of 1882.

The Act of 1882 contains further requirements which must be complied with in the case of such bills of sale. This Act is to be construed as one with the Act of 1878,[7] and the provisions of the Act of 1878 which are inconsistent with the Act of 1882 are repealed.[8]

Consideration less than £30.

Any such bill of sale given or made in consideration of any sum under £30 is void.[9]

Schedule.

Specific description.

Every such bill of sale must contain, or have annexed, an inventory of the personal chattels comprised therein, in which the chattels must be "specifically described," and is void, *except as against the grantor*, in respect of the chattels not so described.[10] The description must not be a mere general description, such as "household furniture and effects," but must be such a description as would be given in an ordinary business inventory, and is suffi-

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[1] *Credit Co.* v. *Pott*, 6 Q. B. D. 295; *Richardson* v. *Harris*, *sup.*; *Ex p. Johnson*, 26 Ch. D. 338; *Darlow* v. *Bland*, [1897] 1 Q. B. 125. See Davidson's Conc. Prec. 274.

[2] *Credit Co.* v. *Pott*, *sup.*

[3] 41 & 42 Vict. c. 31, s. 8. See *post*, p. 103.

[4] *Davis* v. *Goodman*, 5 C. P. D. 128.

[5] Not merely "money lent." See *North Central Wagon Co.* v. *M. S. & L. R. Co.*, 35 Ch. D. 191, 215.

[6] 45 & 46 Vict. c. 43, s. 8. See *Thomas* v. *Kelly*, 13 App. Cas. 506. See *post*, p. 103.

[7] 45 & 46 Vict. c. 43, s. 3.

[8] *Ib.* sect. 15.

[9] *Ib.* sect. 12. See *Davis* v. *Usher*, 12 Q. B. D. 490; *Darlow* v. *Bland*, [1897] 1 Q. B. 125.

[10] 45 & 46 Vict. c. 43, s. 4.

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cient to identify the particular chattels and to distinguish them from other things of the same class.[1]

Grantor must be "true owner."

If the grantor is not, at the time of the execution of the bill of sale, the true owner of any of the personal chattels specifically described in the schedule, the bill is void in respect of such chattels, *except as against the grantor*.[2] If a man has assigned his chattels by an absolute bill of sale, he is not the "true owner" of those chattels;[3] but he is the "true owner" if he has only assigned them by way of security.[4] The person who is the *legal* owner of the chattels at the time of the execution of the bill of sale is a "true owner."[5]

Exception as to crops, fixtures, plant, &c.

The foregoing provisions as to schedule, description, and true ownership, do not render a bill of sale void as to (1) growing crops separately assigned, or (2) fixtures (separately assigned), plant, or trade machinery afterwards substituted for the like articles which were specifically described in the schedule.[6]

After-acquired chattels.

After-acquired chattels, except as aforesaid, which are not in existence at the time when the bill of sale is executed, are not "personal chattels" within the Act, and, therefore, an instrument which assigns future property is not affected by the Act so far as it deals with such property, though the inclusion of such property in the body of a bill of sale will render it void, so far as it is a bill of sale within the Act.[7]

The form.

Every bill of sale given to secure the payment of money by the grantor is void unless made in accordance with the form in the schedule to the Act of 1882.[8] The bill of sale must be "in accordance with" the form,[9] that is, it must be substantially like the form, and must not depart from it in any material respect either by adding to, or subtracting from it anything substantial.[10]

It is inexpedient in such a work as the present to consider in

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[1] *Roberts* v. *Roberts*, 13 Q. B. D. 794; *Witt* v. *Banner*, 20 *Id.* 114; *Carpenter* v. *Deen*, 23 *Id.* 566; *Hickley* v. *Greenwood*, 25 *Id.* 277; *Davidson* v. *Carlton Bank*, [1893] 1 Q. B. 82.

[2] 45 & 46 Vict. c. 43, s. 5.

[3] *Tuck* v. *Southern, &c. Bank*, 42 Ch. D. 471.

[4] *Thomas* v. *Searles*, [1891] 2 Q. B. 408.

[5] *Re Sarl*, [1892] 2 Q. B. 591.

[6] 45 & 46 Vict. c. 43, s. 6. See *London, &c. Co.* v. *Creasey*, [1897] 1 Q. B. 768.

[7] *Thomas* v. *Kelly*, 13 App. Cas. 506. See *post*, p. 103. As to assignments of future property, see *post*, p. 126.

[8] 45 & 46 Vict. c. 43, s. 9.

[9] See Form in Appendix, p. 423.

[10] *Davis* v. *Burton*, 11 Q. B. D. 540; *Melville* v. *Stringer*, 13 *Id.* 392; *Ex p. Stanford*, 17 *Id.* 259; *Thomas* v. *Kelly*, 13 App. Cas. 506.

detail the numerous decisions upon sect. 9, but a brief summary of the more important points may be useful.

A bill of sale will be void under sect. 9 if the name, address, and description of the grantor, grantee, and attesting witness are not stated in the body of the bill and the attestation clause respectively,[1] or if a consideration is not stated,[2] but an incorrect statement in any of these particulars does not make the bill void under sect. 9.[3] Also, if property which is not "personal chattels"[4] within the meaning of the Act, is comprised in the bill, *e.g.*, chattels real or future property;[5] if any provisions are inserted which give a right to seize the goods for any cause not specified in sect. 7;[6] or if the principal sum secured, the rate of interest, or the time of payment, are not definitely stated.[7]

Must contain the whole contract.

It should be added that the bill of sale must contain and show on its face all the terms of the contract, and must not incorporate any terms by reference to another document.[8] The provisions of the Act of 1878 as to the registration of a copy of any "defeazance, condition, or declaration of trust," have been already considered.[9]

Extent of avoidance under the various sections.

It will be observed that, in the various sections of the Acts of 1878 and 1882, the extent to which a bill of sale is made void for non-compliance with the statutory provisions differs very considerably. If a bill of sale, within the Act of 1878, is not duly attested and registered, and the consideration is not truly stated, it is void as against certain persons only, and in respect only of the chattels comprised therein which are in the possession or apparent possession of the grantor;[10] but a bill of sale within the Act of 1882 is, in like case, "void in respect of the personal chattels comprised therein," *i.e.*, as against all persons and without reference to the

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[1] *Parsons* v. *Brand*, 25 Q. B. D. 110; *Simmons* v. *Woodward*, [1891] 1 Ch. 464; [1892] A. C. 100; *Dolcini* v. *Dolcini*, [1895] 1 Q. B. 898; *Altree* v. *Altree*, [1898] 2 Q. B. 267.

[2] *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547; *Simmons* v. *Woodward*, *sup.*

[3] *Heseltine* v. *Simmons*, *sup.* For the effect when these particulars are not correctly registered, see *ante*, p. 101.

[4] *Ante*, p. 96.

[5] *Thomas* v. *Kelly*, 13 App. Cas. 506; *Cochrane* v. *Entwistle*, 25 Q. B. D. 116.

[6] *Furber* v. *Cobb*, 18 Q. B. D. 494; *Real Advance, &c. Co.* v. *Clears*, 20 *Id.* 304; *Topley* v. *Corsbie*, *Id.* 350; *Seed* v. *Bradley*, [1894] 1 Q. B. 319; *Cartwright* v. *Regan*, [1895] 1 Q. B. 900. For sect. 7, see *post*, p. 104.

[7] *Hetherington* v. *Groome*, 13 Q. B. D. 789; *Goldstrom* v. *Tallerman*, 18 *Id.* 1; *Hughes* v. *Little*, *Id.* 32; *Lumley* v. *Simmons*, 34 Ch. D. 698; *Edwards* v. *Marston*, [1891] 1 Q. B. 225; *Re Bargen*, [1894] 1 Q. B. 444; *Weardale, &c. Co.* v. *Hodson*, *Id.* 598.

[8] *Lee* v. *Barnes*, 17 Q. B. D. 77; *Sharp* v. *M'Henry*, 38 Ch. D. 427, 453.

[9] *Ante*, p. 100.

[10] 41 & 42 Vict. c. 31, s. 8. *Ante*, p. 101.

possession.[1] For non-compliance with the provisions of sect. 4 of the Act of 1882, as to the inventory and specific description, a bill of sale is void, "except as against the grantor," in respect of any personal chattels not specifically described in the schedule;[2] and, under sect. 5, a bill of sale is void, "except as against the grantor," in respect of chattels so specifically described of which the grantor was not the true owner.[3] If a bill of sale is not "in accordance with the form" as prescribed by sect. 9 of the Act of 1882,[4] or is made in consideration of a sum under £30,[5] it is "void." The effect of sect. 9 or sect. 12 is not, however, to make the whole instrument void for all purposes, but only to make it void so far as it is a bill of sale within the meaning of the Act; it will be absolutely void as to all the covenants which form part of it as a bill of sale, and as an assignment of "personal chattels,"[6] but it will be valid as an assignment of any property which is not "personal chattels."[7] Under sect. 9 or sect. 12 the covenant to pay is void,[8] but under sect. 8 it remains valid and enforceable.[9]

Seizure of goods and sale.

There is usually contained in a bill of sale an express power to seize on default, but apart from this the grantee has an implied power to seize for any of the causes specified in the Act of 1882.[10] The grantee may not seize or take possession except for one of the following causes:—[11]

> "(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary[12] for maintaining the security;[13]
>
> "(2.) If the grantor shall become a bankrupt, or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes;
>
> "(3.) If the grantor shall fraudulently[13] either remove or suffer the said goods, or any of them, to be removed from the premises;
>
> "(4.) If the grantor shall not without reasonable excuse,[14] upon

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[1] 45 & 46 Vict. c. 43, s. 8. *Ante*, p. 101.

[2] *Ib.* sect. 4. *Ante*, p. 101.

[3] *Ib.* sect. 5. *Ante*, p. 102.

[4] *Ib.* sect. 9.

[5] *Ib.* sect. 12.

[6] *Davies* v. *Rees*, 17 Q. B. D. 408; *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547.

[7] *Re Burdett*, 20 Q. B. D. 310; *Thomas* v. *Kelly*, 13 App. Cas. 506; *Re Isaacson*, [1895] 1 Q. B. 333. *Ante*, p. 96.

[8] *Davies* v. *Rees*, *sup.*

[9] *Heseltine* v. *Simmons*, *sup.*

[10] *Re Morritt*, 18 Q. B. D. 222, 241; *Watkins* v. *Evans*, *Id.* 386.

[11] 45 & 46 Vict. c. 43, s. 7.

[12] *Bianchi* v. *Offord*, 17 Q. B. D. 484, 487.

[13] See *Furber* v. *Cobb*, 18 Q. B. D. 494, 503, 505, 509.

[14] See *Ex p. Cotton*, 11 Q. B. D. 301; *Ex p. Wickens*, [1898] 1 Q. B. 543.

demand in writing[1] by the grantee, produce to him his last receipts for rent, rates, and taxes;

"(5.) If execution shall have been levied against the goods of the grantor under any judgment at law."

And it is provided that the grantor may within five days from such seizure or taking possession apply to the High Court; and the Court, or a judge thereof, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling, or may make such other order as may seem just;[2] and, doubtless in furtherance of such provision, the goods may not be removed or sold until after five clear days from the day they were seized or taken possession of.[3] After the expiration of the five days, this summary remedy given to the grantor is lost, but the equitable right to redeem remains.[4]

Power of sale.

Under the Act of 1882 there is an implied power to sell the goods at the expiration of five days after seizure,[5] but the power of sale given by the Conveyancing Act, 1881 (sect. 19) is not incorporated.[5] As incidental to the power of sale, there are implied trusts by virtue of which the mortgagee may out of the proceeds of sale retain the principal and interest owing, and also the costs and expenses incurred by him in discharging any distress or execution or other incumbrance affecting the goods, and in taking and keeping possession of them, and in removing, warehousing, valuing and selling them;[6] but an express power to retain other sums not coming within the above category will make the bill of sale void.[7]

Debentures.

The mortgages, charges, and debentures of any incorporated company, for the registration of which statutory provision is made, are not within the Bills of Sale Acts,[8] and this includes a deed of charge to cover debentures.[9] The debentures of a society registered under the Industrial and Provident Societies Act are, however, within the Acts, and are not exempted by sect. 17 of the Act

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[1] *Davis* v. *Burton*, 11 Q. B. D. 537, 542; *Ex p. Wickens*, *sup.*

[2] 45 & 46 Vict. c. 43, s. 7; *Ex p. Cotton*, *sup.*; *Ex p. Wickens*, *sup.*; *Ex p. Ellis*, [1898] 2 Q. B. 79.

[3] *Ib.* sect. 13. See *O'Neill* v. *City, &c. Co.*, 17 Q. B. D. 234.

[4] *Johnson* v. *Diprose*, [1893] 1 Q. B. 512.

[5] *Re Morritt*, 18 Q. B. D. 222; *Calvert* v. *Thomas*, 19 *Id.* 204.

[6] *Ex p. Rawlings*, 18 Q. B. D. 489; *Lumley* v. *Simmons*, 34 Ch. D. 698.

[7] *Calvert* v. *Thomas*, 19 Q. B. D. 204; *Furber* v. *Cobb*, 18 *Id.* 494.

[8] *Re Standard, &c. Co.*, [1891] 1 Ch. 627.

[9] *Richards* v. *Kidderminster*, [1896] 2 Ch. 212.

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of 1882, which exempts debentures issued by an "incorporated company."[1]

Priority.

In case two or more bills of sale are given comprising in whole or in part any of the same chattels, they will have priority in the order of the date of their registration;[2] and, as regards bills of sale under the Act of 1878, a bill of sale attested and registered will take priority over one that is earlier but unregistered.[3]

Assignment.

A transfer or assignment of a registered bill of sale, as already stated,[4] need not be registered;[2] and there is no distinction in this respect between a bill of sale by way of security, upon which an equity of redemption is reserved, and an absolute bill of sale, or between an equitable transfer and a legal one.[5]

Entry of satisfaction.

Where the debt for which a bill of sale was made or given has been satisfied or discharged, the registrar may order a memorandum of satisfaction to be written upon any registered copy of it, on the consent of the person entitled to the benefit of the bill of sale, or on proof that the debt has been satisfied or discharged.[6]

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[1] *G. N. R. Co.* v. *Coal, &c. Society*, [1896] 1 Ch. 187.

[2] 41 & 42 Vict. c. 31, s. 10; 45 & 46 Vict. c. 43, s. 3, *ante*, p. 100.

[3] *Conelly* v *Steer*, 7 Q. B. D. 521.

[4] *Ante*, p. 100.

[5] *Ex p. Turquand*, 14 Q. B. D. 636, 644.

[6] 41 & 42 Vict. c. 31, ss. 15, 21; R. S. C., Ord. LXI., rr. 26, 27. See *Re White and Rubery*, [1894] 2 Q. B. 923.

CHAPTER VIII.

SHIPS.

Ships.

Merchant Shipping Act, 1894.

PROPERTY in ships is subject to special laws, partly founded on the civil law as formerly administered by the Court of Admiralty, and partly contained in the Merchant Shipping Act, 1894,[1] which repeals the prior Acts.[2]

Owners.

This Act provides that a ship shall not be deemed to be a British ship unless owned by (1) natural-born British subjects, (2) naturalized persons, (3) denizens, or (4) corporations established under the laws of some part of, and having their principal place of business in, the British dominions.[3] A natural-born subject who has become a citizen or subject of a foreign state, a naturalized person, or a denizen, cannot be owner of a British ship until he has taken the oath of allegiance to the Queen, and resides in, or is partner in a firm carrying on business in the British dominions.[3]

Aliens.

The Naturalization Act, 1870, which enabled an alien to take, acquire, hold, and dispose of real and personal property of every description, especially excepted an alien from being qualified to be the owner of a British ship.[4]

If an alien or other unqualified person acquires any interest in a British ship, except by transmission on marriage, death, bankruptcy, or other lawful means, that interest is subject to forfeiture.[5] In the case of transmission by marriage, &c., an application must be made to the Court for sale of such interest within four weeks after such transmission has taken place.[6]

"Ship."

The Merchant Shipping Act, 1894, defines "ship" as including "every description of vessel used in navigation not propelled by oars," and "vessel" as including "any ship or boat, or any other description of vessel used in navigation."[7]

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[1] 57 & 58 Vict. c. 60.

[2] *Ib.* sect. 745.

[3] *Ib.* sect. 1. See *post*, pp. 383, 398.

[4] 33 Vict. c. 14, s. 14.

[5] Act of 1894, sects. 28, 71, 76.

[6] *Ib.* sect. 28. See *post*, p. 110.

[7] *Ib.* sect. 742. See *Ex p. Ferguson*, L. R. 6 Q. B. 280; *Southport (Mayor of)* v. *Morriss*, [1893] 1 Q. B. 359.

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Registration.

Every British ship must be registered,[1] with the exception of some small vessels not exceeding 15 or 30 tons burden specially employed as in the Act mentioned.[2]

No ship required to be registered will, unless registered, be recognized as a British ship,[1] and may be detained until the master of such ship, upon being required, produces the certificate of registry.[1]

Shares.

With respect to entries in the register book, the property in a ship is to be divided into 64 shares; not more than 64 individuals are to be registered at the same time as owners of any one ship; but this rule does not affect the beneficial title of any number of persons or of any company represented by, or claiming under or through, any registered owner or joint owner; no person is to be registered as owner of any fractional part of a share; but any number of persons not exceeding five may be registered as joint owners of a ship, or of a share or shares therein, and joint owners are to be considered as constituting one person only, and are not to be entitled to dispose in severalty of any interest; a body corporate may be registered as owner by its corporate name.[3] No person is to be registered as owner of a ship, or any share therein, until he has made and subscribed the declaration of ownership prescribed by the Act;[4] and no body corporate is to be so registered until the secretary, or other officer authorized by them for the purpose, has made the prescribed declaration.[5]

The mere fact that several persons hold shares in the same ship does not make them partners; whether they are part-owners only, or partners, depends upon circumstances; the former is the general relation, the latter the exception.[6] In the absence of special circumstances, the holders of the shares have *inter se* the rights of tenants in common, but the law as to the earnings of a ship, whether as freight or otherwise, follows the general law of partnership.[7]

Abbott, C. J., says:—[8]

Disputes between owners.

"It has been the constant practice, in disputes between part-owners as to the employment of the vessel, where the majority in value of the

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[1] Act of 1894, sect. 2. As to "British ship," see *Union Bank* v. *Lenanton*, 3 C. P. D. 243.

[2] *Ib.* sect. 3.

[3] *Ib.* sect. 5.

[4] *Ib.* sect. 9.

[5] *Ib.* sects. 9, 61.

[6] *Helme* v. *Smith*, 7 Bing. 709; Storey on Partnership, chap. 16, s. 417.

[7] *Green* v. *Briggs*, 6 Hare, 395.

[8] *Re Blanshard*, 2 B. & C. 248; 26 R. R. 329.

shareholders are desirous to send the vessel on a voyage to which the minority will not consent, for the Court of Admiralty to arrest the ship at the instance of the latter, and to take from the majority a stipulation in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares. Although the jurisdiction of the Admiralty in such cases was once doubted, there are several authorities recognizing it; and it may now be taken to be settled that, in disputes between part-owners as to the employment of a ship, the Court of Admiralty may arrest and detain the ship, until security be given to the amount of the value of the shares of those part-owners who dissent from the particular employment."

The Court of Admiralty was unable to determine questions of title to the shares in a ship, or to take the accounts between the part-owners; but by the Admiralty Court Act, 1861,[1] it acquired jurisdiction to decide all questions arising between co-owners or any of them touching the ownership, possession, employment, and earnings of any ship registered at any port of England or Wales, and to settle all accounts outstanding and unsettled between them, and to direct the ship or any share to be sold, or to make such order as to it should seem fit.[2]

Trusts.

No notice of any trust, express, implied, or constructive, is to be registered or received by the registrar; and, subject to any rights and powers appearing by the register to be vested in any other party, the registered owner of any ship or share therein has power absolutely to dispose of such ship or share, and to give effectual receipts for the consideration money.[3]

Equitable interests.

Subject to the above provisions, and to the provisions for the exclusion of unqualified persons, equitable interests may be enforced by or against owners and mortgagees in the same manner as in respect of any other personal property.[4] A person beneficially interested, otherwise than by way of mortgage, in a ship or share registered in the name of another, is subject to all pecuniary penalties imposed by statute upon owners.[5]

Transfer of property in ship.

A registered ship or share therein must be transferred by bill of sale according to the prescribed form, executed by the transferor in the presence of and attested by one or more witnesses.[6] It will

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[1] 24 Vict. c. 10, s. 8.

[2] See Maude & Pollock on Merchant Shipping, 102.

[3] Act of 1894, sect. 56; *Bathyany* v. *Bouch*, 50 L. J. Q. B. 421; *The Horlock*, 2 P. D. 243.

[4] Act of 1894, sect. 57. See sect. 5, *ante*, p. 108; *Ward* v. *Beck*, 13 C. B. N. S. 668; *Black* v. *Williams*, [1895] 1 Ch. 408.

[5] Act of 1894, sect. 58.

[6] *Ib.* sect. 24.

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be remembered that transfers or assignments of a ship or vessel or any share thereof are not included in the Bills of Sale Act, 1878.[1] Ships do not pass by delivery; there is no market overt for ships.[2]

The transferee must make and subscribe the prescribed declaration of transfer,[3] and the bill of sale when duly executed must be produced to the registrar of the port at which the ship is registered, and the registrar will enter in the register book the name of the transferee, and indorse the bill of sale with the date of entry; all bills of sale are to be entered in the order of their production to the registrar.[4]

Transmission of property in ship on death, &c.

When the property in a registered ship, or share therein, is transmitted[5] to a qualified person on the marriage, death, or bankruptcy of a registered owner, or by any lawful means other than a transfer under the Act, such transmission must be authenticated by a declaration of the person to whom such property has been transmitted, in the prescribed form, accompanied by the prescribed evidence; and the registrar is to register the name of the person or persons entitled, and such persons, if more than one, however numerous, are to be considered as one person only as regards the rule relating to the number of persons entitled to be registered as owners.[6]

Transmission to unqualified persons.

If the property in a registered ship, or share therein, is transmitted on marriage, death, bankruptcy or otherwise, to an unqualified[7] person, the proper Court may, on application by such person, order a sale and payment of the proceeds to such person.[8] Such application must be made within four weeks of the transmission, but the Court may extend the time, but not so as to exceed one year.[8] If the application is not made in time, or a sale is refused by the Court, the share is subject to forfeiture under the Act.[8]

Mortgages.

A mortgage of a registered ship, or share therein, must be in the prescribed form, and, on production of it, the registrar is to record it in the register book; and every such mortgage is to be recorded in the order of time in which it is produced to him for that purpose.[9] If there is more than one mortgage registered, the

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[1] 41 & 42 Vict. c. 31, s. 4; *ante*, p. 97.

[2] *Hooper* v. *Gumm*, 2 Ch. 282.

[3] Act of 1894, sect. 25.

[4] *Ib.* sect. 26.

[5] As to the meaning of "transmitted," see *Chasteauneuf* v. *Capeyron*, 7 App. Cas. 127.

[6] Act of 1894, sects. 27, 38.

[7] See *ante*, p. 107.

[8] Act of 1894, sect. 28. See sect. 76.

[9] *Ib.* sect. 31. As to the effect of omitting to register the mortgage, see

mortgagees are, notwithstanding any express, implied, or constructive notice, entitled to priority according to the date of registration.[1] Provision is made for entry of the discharge of a mortgage,[2] for transfer of mortgages,[3] for sale by mortgagees,[4] and for the transmission of the interest of a mortgagee, on marriage, death, or bankruptcy, or by any lawful means other than by a transfer.[5] A registered mortgage is not affected by any act of bankruptcy by the mortgagor after the date of the record of the mortgage.[6]

Except so far as may be necessary for making the ship or share available as a security for the debt, a mortgagee is not, by reason of the mortgage, to be deemed the owner, or the mortgagor to have ceased to be the owner.[7] The mortgagor remains the *dominus* of the ship with regard to everything connected with its employment, until the mortgagee takes possession; and the mortgagee when he takes possession is entitled to the benefit of contracts made by the mortgagor.[8]

Certificate of mortgage or of sale.

Any registered owner, desirous of disposing by way of mortgage or sale of the ship or share in respect of which he is registered, at any place out of the country or possession in which the port of registry of such ship is situate, may obtain from the registrar a certificate of mortgage or certificate of sale, as prescribed, enabling him to mortgage or sell the ship or his share therein.[9]

Re-registration.

Whenever a registered ship is so altered as not to correspond to the particulars in the register book, the alteration must be noted on the book of registry, or the registrar may require the ship to be registered anew.[10] Also, upon any change of ownership in any ship, if the owner or owners desire to have the ship registered anew, the registrar at the port at which the ship is already registered is empowered to make such registry anew.[11]

Transfer of registry.

The registry of any ship may be transferred from one port to another, upon the application of all parties appearing on the register

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Keith v. *Burrows*, 1 C. P. D. 722; 2 App. Cas. 636.

[1] Act of 1894, s. 33. See *Black* v. *Williams*, [1895] 1 Ch. 408.

[2] Act of 1894, s. 32.

[3] *Ib.* sect. 37.

[4] *Ib.* sect. 35.

[5] *Ib.* sect. 38. See sect. 27.

[6] *Ib.* sect. 36. See *Hay* v. *Fairburn*, 2 B. & Ald. 193.

[7] Act of 1894, s. 34. See *Collins* v. *Lamport*, 4 De G. J. & S. 500.

[8] *Keith* v. *Burrows*, 2 App. Cas. 636.

[9] Act of 1894, ss. 39—46.

[10] *Ib.* sects. 48—50.

[11] *Ib.* sects. 51—54.

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to be interested in such ship, whether as owners or mortgagees, in manner prescribed.[1]

Charter-party.[2]

The agreement by which a shipowner agrees to place an entire ship, or a part of it, at the disposal of a merchant for the conveyance of goods, binding the shipowner to transport them to a particular place for a sum of money which the merchant undertakes to pay as freight for their carriage, is termed the "charter-party."[3] The term is said to be a corruption of the Latin words *charta partita;* the two parts being usually written in former times on one piece of parchment, which was afterwards divided by a straight line cut through some word or figure, so that one part should fit and tally with the other.[4] Charter-parties are not now usually made by deed: they embody the terms upon which the shipowner lends the use of the ship, and contain stipulations as to the rate of remuneration, the nature of the voyage, and the time and mode of employing the vessel.[5]

Freight

Freight, in the strict meaning of the word, is the recompense to be earned by the owner of the ship if he carries the goods on the voyage and delivers them at the port of destination; but in charter-parties the word "freight" is sometimes used in a secondary meaning,[6] as being money paid in advance by a charterer or shipper of goods on the goods being taken on board, irrespective of their being safely delivered at the end of the voyage, and sometimes as including "dead freight,"[7] *i.e.*, freight which would have been payable for that part of the ship which has not but ought to have been occupied by cargo according to the charter-party.

The right to the freight is incidental to the ownership of the ship, and therefore the assignment of a ship or share in the ship passes a corresponding right to freight under an existing charter-party. But the assignment of freight to be earned is valid in equity, and if notice of the assignment is given to the charterer,[8]

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[1] Act of 1894, s. 53.

[2] See Form in Appendix.

[3] Maude & Pollock, 289.

[4] Abbott's Law of Shipping, 219.

[5] Maude & Pollock, 290.

[6] *Hall* v. *Janson*, 4 E. & B. 509; *Thompson* v. *Gillespie*, 5 E. & B. 215; *Allison* v. *Bristol Marine, &c. Co.*, 1 App. Cas. 224, 225, 239; *Smith* v. *Pyman*, [1891] 1 Q. B. 742; *Oriental, &c. Co.* v. *Tylor*, [1893] 2 Q. B. 518.

[7] *Birley* v. *Gladstone*, 3 M. & S. 205; 15 R. R. 465; *Phillips* v. *Rodié*, 15 East, 547; 13 R. R. 528; *Pearson* v. *Göschen*, 17 C. B. N. S. 352. See also *Gray* v. *Carr*, L. R. 6 Q. B. 522.

[8] See *post*, Chap. IX. "Choses in Action."

the assignee is entitled to the freight as against a person who subsequently takes an assignment of the ship or share.[1]

A mortgagee does not usually by the mortgage alone acquire a right to the freight, but if he takes possession he is then, as owner, entitled to receive the freight.[2]

Payment of freight to the mortgagor at any time before the mortgagee claims payment is a good payment as against the mortgagee.[3]

Lien for freight.

The shipowner has a possessory lien on the goods carried for the freight (using the word in its strict meaning[4]) due in respect of them, and also a lien on the whole of the cargo for any sum which has to be paid for the hire of the ship, even if it is not to be calculated with respect to the quantity of the goods.[5] And by express contract contained in the charter-party the shipowner may have a lien for charges other than freight, such for example as dead freight.[6]

As the shipowner's lien is possessory, he loses it if he delivers the goods; and therefore, in the absence of special contract, he can refuse to deliver them until the freight is paid.[7]

The Merchant Shipping Act, 1894, provides that the shipowner can preserve his lien for freight or other charges, on landing goods and placing them in a wharf or warehouse, by giving notice in writing to the wharfinger or warehouseman.[8] If the lien is not discharged, or the prescribed deposit made,[9] the wharfinger or warehouseman may, after ninety days, or a shorter time if the goods are perishable, sell the goods by public auction and pay the duties, expenses, and amount of the lien.[10]

The charter-party may operate as a demise of the ship itself,[11] in which case the shipowner never obtains possession of goods, and therefore has no lien for his freight, except by express agreement;[12] but, if the construction of the charter-party is ambiguous, there is a tendency not to construe it as a demise.[13]

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[1] *Lindsay* v. *Gibbs*, 22 Beav. 522.

[2] *Keith* v. *Burrows*, 2 App. Cas. 636.

[3] *Rusden* v. *Pope*, L. R. 3 Ex. 269; *Wilson* v. *Wilson*, 14 Eq. 32.

[4] *Kirchner* v. *Venus*, 12 Moo. P. C. 361.

[5] *Neish* v. *Graham*, 8 E. & B. 505.

[6] *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128.

[7] *Campion* v. *Colvin*, 3 B. N. C. 17.

[8] 57 & 58 Vict. c. 60, s. 494.

[9] *Ib.* sects. 495, 496. See *White* v. *Furness*, [1895] A. C. 40.

[10] 57 & 58 Vict. c. 60, ss. 497—500.

[11] *Belcher* v. *Capper*, 4 M. & Gr. 502.

[12] *Baumwoll-Scheibler* v. *Furness*, [1893] A. C. 8.

[13] *Christie* v. *Lewis*, 2 Brod. & B. 410; 23 R. R. 483; *Saville* v. *Campion*, 2 B. & Ald. 503; 21 R. R. 376.

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Bill of lading.

"General ship."

Where a ship is not chartered wholly to one person, but the owners offer her generally to carry the goods of any merchants who may choose to employ her, or where one merchant to whom she is chartered offers her to several sub-freighters for the conveyance of their goods, she is called a "general ship." In these cases the contract entered into by and with the owners, or the master on their behalf, is evidenced by a bill of lading. It generally happens even where the ship is chartered wholly to one person by whom the whole cargo is shipped that there is a bill of lading.[1]

Proceedings *in rem*.

Certain pecuniary claims can be enforced by Courts having Admiralty jurisdiction against the ship, cargo and freight,[2] or against the ship only, or the cargo only. Proceedings to enforce such claims in this manner are called "proceedings *in rem*," and are commenced by process served on the *res*,[3] which is generally followed by the arrest of the *res*.[4] These proceedings depend to a certain extent on maritime lien, which is the right of certain classes of persons to have their demands against the owner of the *res* satisfied out of the *res* in priority to other claimants.

Maritime lien.

A maritime lien relates back to the instant when it arose, and binds the *res* into whosoever hands it may have passed;[5] and, if it is enforced with diligence, even against a *bonâ fide* purchaser without notice.[6]

There are some cases in which a creditor who has not a maritime lien can take proceedings *in rem*, but his position differs from that of the creditor who has a maritime lien. He cannot have an action *in rem*, unless, at the time of its institution, the *res* is the property of his debtor; while the creditor who has the lien, pro-

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[1] See *ante*, p. 67. See form in Appendix.

[2] See *Morgan* v. *Castlegate Co.*, [1893] A. C. 38.

[3] As to the jurisdiction of the Court of Admiralty, see *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 273.

[4] R. S. C., Ord. V. rr. 16, 17. Where the ship belongs to a company which is being wound up, proceedings should be taken in the winding up instead of *in rem* (*Re Australian Navigation Co.*, 20 Eq. 325), unless mortgagees who are not bound by the proceedings in the winding up are in possession; *Re Rio Grande Steamship Co.*, 5 Ch. D. 282. A public ship belonging to a State is not liable to seizure even if it carries passengers and merchandize for hire; *The Parlement Belge*, 5 P. D. 197.

[5] *The Two Ellens*, L. R. 4 P. C. 161; *The Bold Buccleugh*, 7 Moo. P. C. 267.

[6] *The Charles Amelia*, L. R. 2 A. & E. 330.

vided he uses due diligence, can bring the action, notwithstanding that his debtor has ceased to be the owner of the *res*.[1]

The principal matters which give rise to maritime lien are collision, salvage, hypothecation, and the wages of the seamen and master.

Collision.

In case of collision, a maritime lien to the full extent of the damage done attaches on a wrong-doing vessel and her freight,[2] except where the vessel was in charge of a pilot whose employment was compulsory, and the collision was occasioned by his fault.[3] This lien has priority over the lien of a bottomry bond-holder or salvor arising before the collision,[4] and over the lien for wages of the seamen.[5]

Where both ships in fault.

If both ships were in fault, the plaintiff, if his ship were in fault and had substantially contributed to the damage, could not recover at common law,[6] while he could according to the law acted on by the Court of Admiralty. By the Judicature Act, 1873,[7] the Admiralty rules are to prevail. These rules are:—

(1.) Where the damage happens without the fault of either party, each party must bear his own loss.[8]

(2.) If both parties are to blame, the loss must be apportioned between them.

(3.) If the damage happen by the fault of one party only, then if he is the sufferer he must bear his own loss; if he has damaged the other ship, he must compensate it to the full amount of the damage.[9]

Where both vessels are in fault, each is liable for half the aggregate amount of damage sustained, the result being that each vessel bears half its own damage and has to pay for half the damage sustained by the other,[10] or, as it was expressed by Jessel, M. R.,[11] "the Admiralty rule is to take the amount of damage done to each vessel, to add them together and to halve the

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[1] *The Henrich Bjorn*, 11 App. Cas. 277.

[2] *The Flora*, L. R. 1 A. & E. 45; *The Bold Buccleugh*, 7 Moo. P. C. 267.

[3] *Ante*, p. 30; *The Royal Charter*, L. R. 2 Ad. & E. 362; *The Hector*, 8 P. D. 218.

[4] *The Aline*, 1 W. Rob. 111; *The Benares*, 7 Notes of Ca. Suppl. L.

[5] *The Elin*, 8 P. D. 39, 129. See *post*, p. 118.

[6] *Vennall* v. *Garner*, 1 Cr. & M. 21; *Tuff* v. *Warman*, 5 C. B. N. S. 573.

[7] 36 & 37 Vict. c. 66, s. 25 (9).

[8] *The Marpesia*, L. R. 4 P. C. 212; *The Merchant Prince*, [1892] P. 179; *The Schwan*, *Id.* 419.

[9] *The Woodrop Sims*, 2 Dods. 85.

[10] *The Betsey Caines*, 2 Hagg. Ad. 28; *Chapman* v. *The Royal Netherlands Co.*, 4 P. D. 157.

[11] 4 P. D. 160.

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amount, so that each owner is *inter se* to bear half and then to ascertain who is to pay to the other;" and it has been decided that the legal effect is to create not cross liabilities but only one liability, viz., for the excess or balance, and there is only one party who can eventually be made to pay.[1]

Statutory limit of liability.

The owner's liability for loss occasioned without his actual fault or privity is, however, limited to an aggregate amount not exceeding £15 a ton, if there has been loss of life or personal injury, and in other cases not exceeding an aggregate of £8 a ton.[2] The owner is not liable at all for any loss caused by the fault of a compulsory pilot,[3] though in this case, if both vessels are in fault, he can recover only half his own loss.[4]

Compulsory pilotage.

Salvage.

At common law, a person who, by his labour, saves a thing from destruction has a possessory lien on it for payment for his services, but the lien is lost by parting with the thing.[5] Salvage, as the term is used in Courts having Admiralty jurisdiction, is the compensation allowed to persons acting as volunteers, not under a contract or duty binding them to perform the service,[6] by whose exertions a ship, boat, or the cargo of a ship, or the lives of persons belonging to her, are saved from danger or loss in cases of wreck, derelict, capture, or the like.[7] In order to support a claim for salvage, there must be skill and enterprise on the part of the salvors and danger to the property saved.[8] The salvors may, by misconduct, forfeit their claim to salvage reward.[9]

Where salvage services have been rendered to a ship, cargo, or in saving lives of persons on the ship, the salvors are entitled to be recompensed out of the ship and cargo and apparel,[10] and have a maritime lien for the amount on the property.[11] This lien ranks before all maritime liens which had previously attached on the property;[12] and salvage for saving life, when payable by the shipowner, has priority over all other salvage claims.[13]

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[1] *Stoomvaart Maatschappy* v. *P. & O. Co.*, 7 App. Cas. 795; *London Steamship, &c. Insce. Co.* v. *Grampian Co.*, 24 Q. B. D. 663.

[2] Act of 1894, sect. 503. See *Stoomvaart Maatschappy* v. *P. & O. Co.*, 7 App. Cas. 795, where Lord Blackburn reviews the legislation on this subject.

[3] Act of 1894, sect. 633.

[4] *The Hector*, 8 P. D. 218.

[5] *Ante*, pp. 32, 113; *Hartfort* v. *Jones*, 1 Ld. Raym. 393; 2 Salk. 654.

[6] *The Neptune*, 1 Hagg. Ad. 227.

[7] Act of 1894, sects. 544—565.

[8] *The Clifton*, 3 Hagg. Ad. 120; *Castellain* v. *Thompson*, 13 C. B. N. S. 105; *The Strathnaver*, 1 App. Cas. 58.

[9] *The Capella*, [1892] P. 70.

[10] Act of 1894, sects. 544—546.

[11] *Cargo ex Schiller*, 2 P. D. 145.

[12] *The W. F. Safford*, Lush. 69.

[13] Act of 1894, sect. 544 (2).

Bottomry.

Hypothecation may be effected either by way of bottomry or *respondentia*. Bottomry (so called, because formerly the keel or bottom of the ship, as representing the entire fabric, was alone mentioned) is an "hypothecation of the ship, with or without its freight and cargo, as a security for the payment, in the event only of the safe arrival of the ship at her destination,[1] of a debt contracted for the supply of necessaries for the preservation of the ship and the continuance of the voyage. The debt is lost on the non-arrival of the ship,"[2] and the maritime risk falling on the person advancing the money is essential to the validity of the hypothecation.[3]

Bottomry is effected by an instrument in writing called a bottomry bond, signed by the master or owner, and usually, though not necessarily, under seal.[4] The master, or any person who is acting as master even though he is not registered as master,[5] can execute the instrument. A bottomry bond can be given in cases of necessity only, *i.e.*, in cases where, without an advance of money, the ship cannot proceed.[6] Before giving the bond the master must endeavour to obtain the money required on the personal credit of the owner,[7] or from his agent;[8] and he must communicate, if possible, with the shipowner if he intends to hypothecate the ship, or ship and freight only,[9] and with the cargo owner if he intends to hypothecate the cargo only.[10] The person advancing the money must satisfy himself that all these conditions are complied with; but, if they are, he is not bound to see to the application of the money advanced.

If the cargo is included in the bond, the shipowner is bound to indemnify the owner of the cargo.[11]

The bond may be given subsequently to the advance if the advance was made on the promise that it should be secured by the bond;[12] and it may be given to a person who has not actually

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[1] *The Nelson*, 1 Hagg. Ad. 169.

[2] Fisher on Mortgages, 116; *The Atlas*, 2 Hagg. Ad. 48.

[3] *The Indomitable*, Swab. 446; *Stainbank* v. *Shepard*, 13 C. B. 418.

[4] *The Cecilie*, 4 P. D. 210.

[5] *The Jane*, 1 Dods. 464.

[6] *The Orelia*, 3 Hagg. Ad. 84.

[7] *Heathorn* v. *Darling*, 1 Moo. P. C. 5; *Soares* v. *Rahn*, 3 *Id.* 1.

[8] *Lyall* v. *Hicks*, 27 Beav. 616.

[9] *Wallace* v. *Fielden*, 7 Moo. P. C. 398.

[10] *The Gratitudine*, 3 C. Rob. 240; *Kleinwort* v. *Cassa Marittima*, 2 App. Cas. 156.

[11] *Duncan* v. *Benson*, 1 Ex. 537; 3 Ex. 644.

[12] *The Laurel*, Brow. & L. 191.

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advanced money but has pledged his own credit for the expenses incurred.[1]

Foreign ship.

A bottomry bond by the master of a foreign ship is enforceable by the English Admiralty Court, if it be valid according to the law of the flag of the ship, though the conditions imposed by English law as essential to its validity have not been complied with.[2]

Priorities.

In the absence of special circumstances, the bondholder has no priority over persons having claims, either as seaman or master, for wages earned (either in the voyage during which the bond was given or in a subsequent voyage),[3] or in respect of subsequent salvage or collision.[4]

Where there are several bondholders, they have priority *inter se* in inverse order of their date,[5] and where some of the bonds charge ship and freight only, and others charge ship, freight and cargo, they will, if necessary, be marshalled.[6]

Sometimes the master binds himself as well as the ship and freight for payment of the bond. In such cases he cannot assert his lien for wages earned by him against the ship and freight, leaving the bondholder unpaid. But, where he has bound himself as well as the ship, freight and cargo, and the proceeds are sufficient to discharge both his claim and that of the bondholder, he will be allowed to assert his lien against the ship and freight in priority to that of the bondholder.[7]

Respondentia.[8]

Respondentia is the separate hypothecation of merchandise laden or to be laden on board ship as a security for the repayment of a debt contracted for the necessary costs of transmitting and forwarding the merchandise to its destination, or to free it from arrest for salvage. The repayment is made contingent on the safe arrival of the merchandise, and is subject to the same rules as bottomry.[9]

Seamen's wages.

The seamen have a maritime lien upon the ship and freight for their wages, which cannot be given up by any agreement, and is not destroyed[10] by hypothecation of the ship or its sale to a

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[1] *The Royal Arch*, Swab. 269.

[2] *The Gaetano and Maria*, 7 P. D. 137 (see, at p. 144, per Brett, L. J., as to the conditions required by English law).

[3] *The Hersey*, 3 Hagg. Ad. 404.

[4] *The Aline*, 1 W. Rob. 119.

[5] *The Betsey*, 1 Dods. 289.

[6] *The Trident*, 1 W. Rob. 29.

[7] *The Edward Oliver*, L. R. 1 Ad. & E. 379; *The Eugénie*, 4 *Id.* 123.

[8] *The Sultan*, Swab. 504.

[9] *The Cognac*, 2 Hagg. Ad. 386; *The Sultan*, Swab. 510. See, as to communication with the owner of the cargo, *The Onward*, L. R. 4 A. & E. 39.

[10] *The Constancia*, 10 Jur. 845; Act of 1894, sect. 156.

purchaser without notice.[1] This lien will be postponed to liens for subsequent salvage,[2] and for damage done by collision,[3] but has priority over the lien of the master for his wages.[4]

Towage. Towage does not confer a maritime lien.[5] If a vessel contracts to tow, and a serious danger arises which was not in the contemplation of the parties when they entered into the contract, she may be justified in abandoning the contract, and may become entitled to salvage.[6]

Pilotage. A pilot is said to have a maritime lien.[7] When a pilot performs services to a vessel which he could not reasonably be expected to perform, even for extraordinary pilotage fees, he may (but not easily) become entitled to salvage.[8]

Master's wages and disbursements. Formerly the master had no maritime lien for his wages,[9] but now he has the same rights, liens, and remedies for the recovery of his wages that seamen have.[10] He also has the same rights, liens, and remedies, so far as the case permits, for the recovery of disbursements or liabilities properly made by him on account of the ship,[11] that is, for which he had authority to pledge the shipowner's credit.[12]

Priorities between maritime liens. It will be observed that in every case, except collision, in which a maritime lien arises, the person becoming entitled to the lien has done something which is for the common benefit of all persons interested in the *res* on which the lien attaches, including persons interested in maritime liens which have previously attached on the *res*. It follows that, as a general rule, a maritime lien posterior in date has priority over one of prior date.

Collision. In the case of collision, the ship which is in fault must have been navigated faultily, and, as we have seen, the maritime lien arising in favour of the ship entitled to be paid not only takes precedence of maritime liens prior in date, but also of the lien of the seamen for wages earned by them since the collision.[13]

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[1] *The Sydney Cove*, 2 Dods. 13.

[2] *The Gustaf*, Lush. 506.

[3] *The Elin*, 8 P. D. 129.

[4] *The Salacia*, Lush. 545.

[5] *The Henrich Bjorn*, 10 P. D. 44; 11 App. Cas. 270, 283; *Westrup* v. *Great Yarmouth Co.*, 43 Ch. D. 241.

[6] *The I. C. Potter*, L. R. 3 A. & E. 292; *The Liverpool*, [1893] P. 154.

[7] Kay on Shipmasters and Seamen, § 514; *Ross* v. *Walker*, 2 Wils. 264. But see Merchant Shipping Act, 1894, ss. 156, 591, 742.

[8] *Akerblom* v. *Price*, 7 Q. B. D. 129; *The Æolus*, L. R. 4 A. & E. 29.

[9] *Smith* v. *Plummer*, 1 B. & Ald. 575; 19 R. R. 391.

[10] Act of 1894, sect. 167.

[11] *Ib.* sect. 167 (2). For the previous law, see *The Sara*, 14 App. Cas. 209.

[12] *Morgan* v. *Castlegate Co.*, [1893] A. C. 38; *The Orienta*, [1895] P. 49.

[13] *The Elin*, 8 P. D. 129.

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Possessory lien for repairs and necessaries.

A person who repairs a ship, or supplies her with necessaries,[1] has a *possessory* lien on it for his remuneration[2] which is subject to existing maritime liens,[3] and is lost on his giving up possession. There is no *maritime* lien in such cases.[4]

General average.

A general average sacrifice or act, commonly called "general average," is an extraordinary[5] sacrifice[6] of part of the ship or part of the cargo, or of both, voluntarily and properly made, or an extraordinary expenditure voluntarily incurred for the common preservation of the ship and cargo in time of peril.[7] A general average loss is one which is immediate and consequential on a general average act,[8] and general average contribution is the payment which has to be made by the persons benefited by a general average sacrifice in order to indemnify the person making that sacrifice against so much of his loss and of the expenses caused directly by the sacrifice as does not fall to his own proportionate share.[9]

The ship, nett freight and cargo[10] have (but the wearing apparel, &c., of the passengers and crew, the wages of the crew, and the stores and provisions[11] of the ship have not) to contribute. The value of the ship must be taken at the end of the voyage;[12] or, if she is lost, at the place whence she sailed, after allowing for wear and tear up to the time of her loss.[12] The nett freight consists of the clear earnings after deducting the expenses of the voyage, including wages. The goods are valued, if the vessel reaches her destination, at their selling price there, and if she puts back to the place where she laded, at their invoice price.

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[1] As to the meaning of "necessaries," see *Webster* v. *Seekamp*, 4 B. & Ald. 354; 23 R. R. 307; *The Henrich Bjorn*, 8 P. D. 151; *The Marianne*, [1891] P. 180.

[2] *Williams* v. *Allsup*, 10 C. B. N. S. 417.

[3] *The Gustaf*, Lush. 506.

[4] *The Henrich Bjorn*, 11 App. Cas. 270.

[5] *Covington* v. *Roberts*, 2 B. & P. N. R. 378; 9 R. R. 669; *Power* v. *Whitmore*, 4 M. & S. 149; 16 R. R. 416.

[6] *Shepherd* v. *Kottgen*, 2 C. P. D. 585.

[7] *Butler* v. *Wildman*, 3 B. & Ald. 398; 22 R. R. 435; *Atwood* v. *Sellar*, 5 Q. B. D. 289; *Svensden* v. *Wallace*, 13 *id.* 69; 10 App. Cas. 404; *Shepherd* v. *Kottgen*, 2 C. P. D. 585; *Rose* v. *Bank of Australasia*, [1894] A. C. 687.

[8] *Atwood* v. *Sellar*, 5 Q. B. D. 289; *Whitecross Wire Co.* v. *Savill*, 8 *id.* 661.

[9] *Svensden* v. *Wallace*, 13 Q. B. D. 84. On the origin and foundation of the law as to general average contribution, see *Burton* v. *English*, 12 Q. B. D. 218, 220, per Brett, M. R.; *Strang* v. *Scott*, 14 App. Cas. 601, 607; *The Marpessa* [1891] P. 403.

[10] *Dobson* v. *Wilson*, 3 Camp. 480; 14 R. R. 817.

[11] *Brown* v. *Stapleton*, 4 Bing. 119; 29 R. R. 524.

[12] *Grainger* v. *Martin*, 4 B. & S. 9. See *Henderson* v. *Shankland*, [1896] 1 Q. B. 525.

Particular average.

Particular average is where any damage is done to the cargo or vessel by accident or otherwise, such as the loss of an anchor or cable, or the turning sour of a cargo of wine. Losses of this nature have to be borne by the owner of the thing damaged.[1] The phrase "particular" average is used as showing that the particular owner is alone liable for the loss.[2]

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[1] *The Copenhagen*, 1 Rob. 289.

[2] See various definitions of particular average collected in *Great Indian R. Co.* v. *Saunders*, 1 B. & S. 51.

CHAPTER IX.

CHOSES IN ACTION.

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THE phrase "*chose in action*" is used in contradistinction to "chose in possession."[1] It is used in various meanings, which have been the subject of much controversy.[2] Sometimes it denotes the rights of the person entitled to property, sometimes the property over which he has rights, and sometimes the instrument which evidences those rights.[3]

Where the term *chose in action* occurs in a statute, the context may show that it is not to be taken in its widest meaning.[4]

Blackstone says:—[5]

> "Property in chattels personal may be either in possession, where a man hath not only the right to enjoy but hath the actual enjoyment of the thing, or else it is in action, where a man hath a bare right without any occupation or enjoyment."[6]

This definition includes the rights of a person out of possession of a specific corporeal chattel, as for instance the rights of a bailor, but the term "chose in action" is commonly restricted to certain rights to the payment of money.

The rights of the owner of a specific chattel of which he has not the possession are very different from the rights of a person to whom money is due. Where a specific chattel is bailed, the owner can sell it, and by the sale the general property passes to the buyer subject to the special property of the bailee.[7] If the bailee wrongfully delivers the goods to a stranger so as to determine the bailment,[8] the bailor can maintain an action for the injury done

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[1] As to the meaning of "possession," see *ante*, p. 12.

[2] *Colonial Bank* v. *Whinney*, 30 Ch. D. 261; 11 App. Cas. 426; *Fleet* v. *Perrins*, L. R. 4 Q. B. 500; Wms. Pers. P. 27.

[3] Elph. Introd. 183.

[4] *Colonial Bank* v. *Whinney*, *sup.*

[5] 2 Bl. 389.

[6] *I.e.*, without possession. See *Purdew* v. *Jackson*, 1 Russ. 44; 25 R. R. 1. For a good example of the distinction, see *Flower's Case*, Noy, 67.

[7] *Franklin* v. *Neate*, 13 M. & W. 481; *ante*, pp. 16, 22.

[8] *Ante*, p. 24.

to his right to possess against both the bailee and the stranger, unless the latter bought them from the bailee in market overt. As we have already seen,[1] a person from whom goods have been stolen can maintain an action against an innocent person in whose hands they are. On the other hand, as we shall see (*post*, p. 125), a person to whom money is due cannot generally at common law transfer his right to sue for it to a stranger, and no act of the debtor will confer on his creditor a right to recover the money from a stranger.

Again, it may be observed that there is a difference between a specific corporeal chattel and money due, inasmuch as the latter may not exist, or may never exist; a debt may be paid by bank notes or cash which were not printed or coined at the time when it was incurred; or it may even be discharged by entries in books.

Formerly the phrase "chose in action real" was applied to a right of entry on land;[2] but at the present day the phrase "chose in action" is restricted to rights over personal property, subject to the following observations:—

(1) A mortgage debt is not the less a *chose in action* because it is secured on real estate.

(2) A contract relating to realty creates a chose in action. This may perhaps be explained by the fact that at law the only remedy for breach of contract was in damages, which are personal property.

Choses in action considered as rights.

If we regard choses in action as consisting of rights, we may divide them as follows:—

(1) Rights under a contract;

(2) Rights to money payable otherwise than under a contract;[3] as, for example, money payable under an order of Court.

The reader may perhaps have some difficulty in seeing how rights under a contract which does not relate to property (as, for instance, to do work) can be considered as rights over things. Blackstone[4] explains this by pointing out that if a man contracts to do any act and fails in it, the remedy is in damages, *i. e.*, money. But, however this may be, rights arising under contracts of any nature are *choses in action*.

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[1] *Ante*, p. 42.

[2] Bro. Ab. tit. *Choses in Action and Suspense*, 141, pl. 14.

[3] The right to recover damages in respect of a tort is not called a chose in action.

[4] 2 Bl. 397.

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Choses in action considered as things.

On the other hand, if we regard choses in action as consisting of the things over which rights are exerciseable, they may be divided into,—

(1.) Money recoverable under a contract, or as damages for breach of contract;

(2.) Debts of record; judgment debts;

(3.) Shares and stock in companies.[1]

As to money recoverable under a contract, or as damages for breach of contract, Blackstone says:[2]—

"Money due on a bond is a chose in action: for a property in the debt vests at the time of forfeiture mentioned in the obligation; but there is no possession till recovered by course of law. If a man promises or covenants with me to do any act and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action; for, though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be can only be ascertained by verdict, and the possession can only be given to me by legal verdict and execution."

Some of the more important choses in action are specialty debts, simple contract debts (which include moneys secured by bills of exchange, promissory notes and cheques),[3] debts of record, judgment debts,[4] and moneys payable under policies of assurance.[5]

A specialty debt is one created by a contract under seal, *i.e.*, by deed; a simple contract debt is one which is created by writing not under seal, or by a verbal contract, express or implied, and which is not of record.

There are two other classifications of choses in action.

Choses in action, legal and equitable.

First, according to the manner in which the rights of the person entitled to the chose in action can be enforced.

If the rights can be enforced at law, the chose in action is called a legal chose in action, as, for instance, where it is a debt. If they can be enforced in equity only, the chose in action is called an equitable chose in action, as, for instance, a legacy.[6] So, if a mortgage debt, or railway stock, be vested in trustees on trust to pay the interest or dividends to A., A.'s right to the interest or dividends is enforceable in equity only, and therefore it is an

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[1] *Colonial Bank* v. *Whinney*, 11 App. Cas. 426. The nature of a share and of stock in a company will be discussed in Chap. XVI.

[2] 2 Bl. 397.

[3] *Post*, Chap. XII.

[4] As to the different classes of debts, see *post*, Chap. XI.

[5] *Post*, Chap. X.

[6] *Deeks* v. *Strutt*, 5 T. R. 690.

equitable chose in action, while, as the trustees have a legal right to sue for the interest or dividends, their right is a legal chose in action.

Reversionary chose in action.

Where the right, whether legal or equitable, is to the future enjoyment of personal property, it is called a reversionary chose in action; an example is afforded by a policy of assurance, by virtue of which moneys are to be paid on the death of a living person.

Assignment of choses in action.

Secondly.—Choses in action can also be classified according to the manner in which, prior to the Judicature Acts,[1] they were assignable. There were four classes: (1) those assignable at common law; (2) those assignable in equity only; (3) those assignable by statute; (4) those incapable of being assigned either at law or in equity.[2]

Choses in action not assignable at common law.

Generally speaking, choses in action were not assignable at common law, that is to say, if A. assigned his chose in action to B., B. could not maintain an action in his own name against the debtor. Coke states[3] the reason to be,—"For that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice."[4] A better explanation of the rule, however, is that it is "a logical consequence of the archaic view of a contract, as creating a strictly personal obligation between the creditor and the debtor";[5] or that[6] at common law the ownership, whether of land or of chattels, could be transferred only by delivery of possession, and that therefore it could not be transferred at all where delivery of possession was impossible, unless in the exceptional case where it was transferred to a person already in possession. If the latter view be correct, the reason why the owner of a *chose in action* was unable to assign it at common law was that, owing to its having a mere notional existence, it was impossible to deliver possession of it.

Exceptions.

There were, however, a few exceptional cases where choses in action were assignable at law.

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[1] The Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, came into operation in 1875.

[2] See generally on assignment of choses in action, the notes to *Ryall* v. *Rowles*, 1 W. & T. 96; Pollock on Contr. 204 *et seq.*; Leake on Contr. 996.

[3] *Lampet's Case*, 10 Rep. 48*a*.

[4] As to "maintenance" and "champerty," see *post*, p. 135.

[5] Pollock on Contr. 206.

[6] This view was suggested by Prof. Maitland in 2 Law Quarterly, 481.

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The Crown.

The Crown has always been able to assign choses in action that are certain, such as an ascertained debt, so that the grantee can sue in his own name,[1] but not those that are uncertain, as damages before they are ascertained.[2] A chose in action could always be assigned to the Crown.[3]

Annuities, &c.

An annuity is assignable at common law;[4] bills of exchange, which include cheques on a bank,[5] and exchequer bills to bearer,[6] were assignable by the law merchant, which is part of the law of England.[7]

Assignment in equity.

All choses in action, except those which are altogether incapable of being assigned, can be assigned in equity; and, prior to the Judicature Act, 1873, this was the only method of assigning choses in action not assignable at law. In the following paragraphs we shall discuss the law prior to that Act.

Before Judicature Act.

An equitable assignment for value[8] had the effect of an agreement by the assignor with the assignee to permit the latter to bring an action in the assignor's name to recover the chose in action, which agreement a Court of Equity would enforce specifically on the terms of an indemnity by the assignee to the assignor against the costs.[9] If the chose in action was equitable, the assignee could sue in equity in his own name and in his own right; but, where it was legal, a Court of Equity would not entertain a suit by the assignee[10] in the absence of special circumstances rendering it impossible or difficult for him to proceed at law, as, for instance, where the assignor declined to allow him to sue in his name, or did or threatened to do something which would prevent him from recovering in an action at law in his name.[11]

Assignment of after-

Where a man who is not the owner of property purports to

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[1] Y. B. 39 H. 6, 26.

[2] See the cases collected in Vin. Ab. tit. *Prerogative of the King* (M. b. 9); *Breverton's Case*, Dy. 30*b*; *Wendham's Case*, Cro. Jac. 82; *Rex* v. *Twine*, Cro. Jac. 179; *Lambert* v. *Taylor*, 4 B. & C. 138. And see Chitty on the Prerogative, 387.

[3] Per Parker, C. J., *Myles* v. *Williams*, Gilb. Rep. K. B. 321.

[4] Co. Litt. 144*b*, note 1 (by Hargrave); *Baker* v. *Brooke*, 1 Dy. 65*a*; Moore, 5, pl. 18.; *Maund's Case*, 7 Rep. 28*b*.

[5] Per Jessel, M. R., *Hopkinson* v. *Forster*, 19 Eq. 76.

[6] *Wookey* v. *Pole*, 4 B. & Ald. 1; 22 R. R. 594.

[7] M. L. R. P. 3; Co. Litt. 182*a*. As to bills of lading, see *ante*, p. 67.

[8] *Ward* v. *Audland*, 8 Beav. 201.

[9] *Row* v. *Dawson*, 1 Ves. sen. 331; 1 W. & T. L. C. 93; *Crouch* v. *Credit Foncier*, L. R. 8 Q. B. 380.

[10] *Rose* v. *Clarke*, 1 Y. & C. C. C. 534; *Keys* v. *Williams*, 3 Y. & C. Ex. 462.

[11] *Hammond* v. *Messenger*, 9 Sim. 327.

assign it, the attempted assignment cannot operate as a conveyance of the legal interest in the property, but it may operate as a contract to assign it when he becomes the owner of it; and in this case, if he has received the consideration, the instant that the property belongs to him, Equity, treating that which ought to be done as done, fastens on the property, and the contract to assign becomes an assignment,[1] but an assignment of the equitable interest only, so that if, before the assignee acquires the legal interest (*e.g.*, in the case of moveable chattels by acquiring possession), some other person acquires the legal interest as a purchaser for value without notice, his rights have priority over those of the assignee.[2]

acquired property.

An assignment of future property will be enforced as to all property which falls within the general descriptive words of the assignment, however wide and comprehensive they may be.[3] It has been said that an assignment of *all* future property may be invalid, but this question seems still to be open.[4]

No particular form is required for an assignment in equity of a chose in action.[5] For instance, "an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."[6]

Assignment, how made.

As between the assignor and assignee, the equitable assignment of a *chose in action* is effectual without any notice to the debtor or trustee;[7] but, as between the assignee and the debtor or trustee and other persons subsequently acquiring an interest in the debt or trust fund, it is incomplete until the debtor or trustee receives notice, which may be of an informal nature,[8] of the assignment.

Notice necessary to perfect assignment as to third persons.

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[1] *Collyer* v. *Isaacs*, 19 Ch. D. 342; *Re Clarke*, 36 Ch. D. 348; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Re Turcan*, 40 Ch. D. 5.

[2] *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hallas* v. *Robinson*, *Id.* 288.

[3] *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Re Turcan*, 40 Ch. D. 5.

[4] *Re D'Epineuil*, 20 Ch. D. 758; *Tailby* v. *Official Receiver*, *sup.*; *Re Turcan*, *sup.*

[5] *Row* v. *Dawson*, 1 Ves. sen. 331; *Howell* v. *MacIvers*, 4 T. R. 690; 2 R. R. 500.

[6] Per Cottenham, C., *Burn* v. *Carvalho*, 4 My. & Cr. 702; *Ex p. South*, 3 Swanst. 392; 19 R. R. 227; *Addison* v. *Cox*, 8 Ch. 76; *Durham* v. *Robertson*, [1898] 1 Q. B. 765.

[7] Whether the case is within the Judicature Act (*Gorringe* v. *Irwell*, 34 Ch. D. 128), or not (*Burn* v. *Carvalho*, 4 My. & Cr. 690; *Hobson* v. *Bell*, 2 Beav. 17).

[8] *Lloyd* v. *Banks*, 3 Ch. 489; *Meux* v. *Bell*, 1 Ha. 73; *Alletson* v. *Chichester*, L. R. 10 C. P. 319; *Ex p. Agra Bank*, 3 Ch. 562; *Bence* v. *Shearman*, [1898] 2 Ch. 582.

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At any time before notice the debtor or trustee may discharge himself by payment to the assignor or his subsequent assignee, the result being that the priority between successive assignees is determined not by the date of the assignments, but by the dates at which notice is acquired,[1] except where the notices are given to a trustee before the fund comes into his hands,[2] or where no notice is given of any assignment; in either of which cases the assignments rank according to their dates.

In like manner the title of the trustee in bankruptcy of the owner of an equitable chose in action will be postponed to his assignee without notice of the act of bankruptcy, if the latter gives notice to the debtor or trustee of the fund before the trustee in bankruptcy does so.[3]

There is an exception to the rule in the case of mortgage debts secured on land, for notice to the mortgagor does not affect priorities;[4] and the rule does not apply to equitable interests in land,[5] but it does apply to interests in money to arise from the sale of real estate.[6]

Assignment with notice of prior assignment.

Every assignee of a chose in action takes it subject to the rights conferred by any prior assignment of which he had notice at the time of the assignment to himself, whether notice of such prior assignment is or is not given to the trustee or debtor;[7] and he is considered to have notice of every prior assignment which he could discover by inquiry from the trustee or debtor,[8] though a trustee is not bound to answer such inquiry.[9] Conversely he is not affected by any prior assignments which he could not have discovered by such inquiry, so that a prior assignee who perfects his assignment by notice to all the trustees of the fund may lose his priority when all the trustees to whom he gave notice are dead, and a subsequent assignee under an assignment made after the death of the surviving

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[1] *Dearle* v. *Hall*, 3 Russ. 1; 27 R. R. 1; *Loveridge* v. *Cooper*, 3 Russ. 30; 27 R. R. 1; *Re Freshfield*, 11 Ch. D. 198; *Ward* v. *Duncombe*, [1893] A. C. 369; Pollock on Contract, 207 *et seq.* See 11 Law Quarterly, 337.

[2] *Buller* v. *Plunkett*, 1 J. & H. 441; *Webster* v. *Webster*, 31 Beav. 393.

[3] *Palmer* v. *Locke*, 18 Ch. D. 381.

[4] *Jones* v. *Gibbons*, 9 Ves. 411; 7 R. R. 247; *Re Richards*, 45 Ch. D. 589.

[5] *Jones* v. *Jones*, 8 Sim. 633; *Wiltshire* v. *Rabbits*, 14 Sim. 76.

[6] *Lee* v. *Howlett*, 2 K. & J. 531; *Arden* v. *Arden*, 29 Ch. D. 702.

[7] *Warburton* v. *Hill*, Kay, 470; *Ord* v. *White*, 3 Beav. 357; *Newman* v. *Newman*, 28 Ch. D. 674.

[8] *Smith* v. *Smith*, 2 Cr. & M. 233; *Willes* v. *Greenhill*, 4 De G. F. & J. 150; *Ward* v. *Duncombe*, *sup.*

[9] *Low* v. *Bouverie*, [1891] 3 Ch. 82.

trustee gives notice of that assignment to new trustees who had no notice of the prior assignment.[1]

Notice to one of several trustees.

Notice of an assignment given to one of several trustees or debtors is sufficient, though it be not communicated to any other trustee or debtor, unless it be to the interest of the person receiving the notice to conceal the assignment.[2] A proposed assignee must, on the other hand, make inquiry of all the trustees.[3]

Notice must be given to the person who is trustee for the assignor, and not to any person who may happen to be holding the property as a trustee.[4]

Stop orders on funds in Court.

Where the chose in action is a fund in Court, by obtaining a stop order the assignee can protect his interest to the same extent as if the fund had been in the hands of trustees for the assignor and notice had been given to them; and notices given to the trustees before the fund was paid into Court remain effectual.[5] The effect of the stop order is to prevent the transfer or payment of the fund without notice to the assignee obtaining the order.[6]

Assignment of chose in action is subject to equities.

The assignee of a chose in action takes it subject to all equities existing between the assignor and the debtor or trustee at the time when the assignment becomes binding on the latter.[7] For example, the assignee of debentures of a company in the ordinary form takes them subject to the equities of the company against the person to whom they were issued.[8] The debtor or trustee cannot set up any equities that arise against the assignor after notice of the assignment, even if they arise out of a liability existing at the time of the notice;[9] but he may set off sums of money then already due and becoming payable subsequently.[10]

So also where a trustee assigns, absolutely or by way of a mort-

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[1] *Phipps* v. *Lovegrove*, 16 Eq. 80; *Ward* v. *Duncombe*, *sup.*

[2] *Browne* v. *Savage*, 4 Drew. 635; *Meux* v. *Bell*, 1 Ha. 73. See *Willes* v. *Greenhill*, 31 L. J. Ch. 1.

[3] *Low* v. *Bouverie*, [1891] 3 Ch. 104; *Ward* v. *Duncombe*, *sup.*

[4] *Stephens* v. *Green*, [1895] 2 Ch. 148.

[5] *Pinnock* v. *Bailey*, 23 Ch. D. 497; *Mutual Society* v. *Langley*, 32 Ch. D. 460; *Stephens* v. *Green*, *sup.*; *Mack* v. *Postle*, [1894] 2 Ch. 449.

[6] See R. S. C., Ord. XLVI. rr. 12, 13; Seton on Judgments, 420; Pemberton on Judgments, 169, 170; note to *Ryall* v. *Rowles*, 1 W. & T. 96; *Stephens* v. *Green*, *sup.*

[7] *Cavendish* v. *Geaves*, 24 Beav. 163; *Rolt* v. *White*, 3 De G. J. & Sm. 360; *Christie* v. *Taunton*, [1893] 2 Ch. 175; Pollock on Contr. 209; Leake on Contr. 1010.

[8] *Athenæum Co.* v. *Pooley*, 3 De G. & J. 294; *Re Natal Co.*, 3 Ch. 355; *Ex p. James*, 8 Eq. 225.

[9] *Watson* v. *Mid-Wales R. Co.*, L. R. 2 C. P. 593; *Christie* v. *Taunton*, *sup.*

[10] *Jeffryes* v. *Agra Bank*, 2 Eq. 674; *Ex p. Mackenzie*, 7 Eq. 240.

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gage, a beneficial interest which he has in the trust fund, the assignee takes it subject to the right of other beneficiaries to have the assignor's interest applied in recouping a breach of trust committed by him, though subsequent to the assignment.[1]

Negotiable instruments, the peculiar nature of which is explained in a subsequent chapter,[2] form an exception to the rule that the assignee of a chose in action takes it subject to equities.

Chose in action made by contract assignable free from equities.

It is competent for the debtor to preclude himself from setting up as against assignees any equities that he would have had against the original creditor;[3] and he may do this by contract, either express or implied, made either with the original creditor,[4] or, after notice of the assignment, with his assignee.[5] This result is sometimes arrived at on the ground of estoppel.

Choses in action transferable by statute.

It has generally happened that where a new kind of chose in action is created by statute it is expressly made transferable at law in a specified manner, and, where this is the case, it can, generally speaking, be transferred in equity also. By "transferable at law" it is meant that the transferee is enabled to maintain an action in his own name.

Examples of this are afforded by the public funds, legal transfers of which can be effected only by entries made in the transfer books at the Banks of England or Ireland and signed by the party making the transfer or his attorney,[6] or, if the stockholder obtains a stock certificate, by delivery of the certificate.[7]

Assignment of shares in corporations or companies.

A member of a corporation cannot assign his interest in the corporate property and introduce his assignee into the corporation without statutory authority.[8] Such authority is expressly given in the case of companies regulated by the Companies Clauses Consolidation Act, 1845, which provides for the transfer of shares in the company by deed delivered to the secretary, and the entry

[1] *Doering* v. *Doering*, 42 Ch. D. 203; *Bolton* v. *Curre*, 70 L. T. 759.

[2] *Post*, Chap. XII.

[3] *Ex p. Asiatic Bank*, 2 Ch. 391; Leake on Contr. 1012; Pollock on Contr. 211, and *post*, p. 165.

[4] *Re Blakely Co.*, 3 Ch. 154; *Higgs* v. *Assam Co.*, L. R. 4 Ex. 387.

[5] *Ib.*; *Re Northern Assam Co.*, 10 Eq. 458; *Ex p. Chorley*, 11 Eq. 157.

[6] The National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 22.

[7] *Ib.* Part V.

[8] *Duvergier* v. *Fellows*, 5 Bing. 267; *Blundell* v. *Winsor*, 8 Sim. 601. As to incorporated companies, see Lindley on Companies, 130; sect. 4 of the Companies Act, 1862 (25 & 26 Vict. c. 89); *Smith* v. *Anderson*, 15 Ch. D. 247, *post*, p. 257.

of a memorial thereof by the secretary of the company in the "register of transfers."[1] Mortgages and bonds (commonly called debentures) of the company issued under the powers of the same Act are transferable at law by registered deed.[2]

The shares of a company registered under the Companies Act, 1862, are transferable in the manner prescribed by the regulations of the company, *i.e.*, generally by the execution of an instrument of transfer registered in the books of the company.[3]

Shares of a company.

It has been said that, in the case of shares in a company registered under the Companies Act, 1862, notices given to the company of equitable interests or trusts would be absolutely inoperative to affect the company with any trust, by reason of the provisions of sect. 30 of that Act.[4] Where, however, the company has a lien or charge upon the shares for debts due from the holder, notice from an equitable assignee of shares given to the company will prevent the company from claiming priority in respect of debts incurred after such notice.[5]

Distringas. 5 Vict. c. 5.

The equitable assignee should protect himself by proceedings under the Act 5 Vict. c. 5, by filing an affidavit and notice in the prescribed form in the Central Office of the Supreme Court, and serving an office copy of the affidavit and a duplicate notice on the company.[6]

The Rules provide that the service on the company shall have the same force and effect against the company as a writ of *distringas* duly issued under the Act 5 Vict. c. 5, s. 5, would have had;[7] that is, to prevent the fund being dealt with without the person who issued the writ having an opportunity of asserting his claim.[8] The effect of the notice served under the new procedure is temporary only; and it should be followed up by obtaining an order under sect. 4 of 5 Vict. c. 5,[9] upon motion or petition in a summary way, without action, to restrain the company from permitting the transfer of the stock or shares, or from paying any dividend or

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[1] 8 & 9 Vict. c. 16, ss. 14, 15; *Nanney* v. *Morgan*, 35 Ch. D. 598; 37 Ch. D. 346.

[2] *Ib.* ss. 46, 47; *Vertue* v. *East Anglian R. Co.*, 5 Ex. 280.

[3] 25 & 26 Vict. c. 89, s. 22; *post*, Chap. XVI.

[4] *Société de Paris* v. *Walker*, 11 App. Cas. 20, 30, per Lord Selborne.

[5] *Bradford Bank* v. *Briggs*, 12 App. Cas. 29.

[6] R. S. C., Ord. XLVI.

[7] Ord. XLVI. r. 8.

[8] See per Stuart, V.-C., in *Wilkins* v. *Sibley*, 4 Giff. 446, 447, and *Etty* v. *Bridges*, 2 Y. & C. C. C. 486.

[9] See *Re Blaksley*, 23 Ch. D. 549; *Re Prynne*, 53 L. T. 465.

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dividends due or to become due thereon; or, in the case of the Bank of England, an injunction may be obtained against the bank, under 39 & 40 Geo. 3, c. 36, in an action against the person interested in the stock.[1]

Choses in action assignable by statute.

The following classes of choses in action have been made assignable at law by statute, so as to enable the assignee to sue in his own name:—

Promissory notes were made transferable by indorsement.[2]

Policies of life assurance were made transferable by assignment by an instrument in the words or to the effect prescribed,[3] on written notice of the date and purport of the assignment being given to the assurance company at their principal place of business for the time being; and the dates of the receipt of notice are to regulate priority of claims under assignments,[4] as between the company and the assignees.[5]

A policy of insurance on any ship, or on any goods in any ship, or upon freight, was made assignable at law "to any person entitled to the property thereby assured" by the Policies of Marine Assurance Act, 1868.[6] An assignment is valid if made after the loss of the goods by perils insured against;[7] but an assignment after the assignor has parted with his interest in the property is not valid, unless at the time he parted with the property the assignor agreed to assign the policy.[8]

Administration bonds are made assignable, on breach, by order of Court.[9]

Other instances of choses in action transferable by statute are East India bonds,[10] mortgage debentures of land companies under the Mortgage Debenture Act, 1865,[11] debentures and debenture stock issued under the Local Loans Act, 1875,[12] choses in action of companies where sold by the official liquidator,[13] bail bonds,[14] and replevin bonds.[15]

Vesting of choses in

Under the Trustee Act, 1893, the right to recover and receive

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[1] Seton on Judgments, vol. i. p. 618.

[2] 3 & 4 Anne, c. 8; repealed by Bills of Exchange Act, 1882, *post*, p. 194.

[3] See *Spencer* v. *Clarke*, 9 Ch. D. 137.

[4] The Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144).

[5] *Newman* v. *Newman*, 28 Ch. D. 674.

[6] 31 & 32 Vict. c. 86.

[7] *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299.

[8] *North of England Co.* v. *Archangel Co.*, L. R. 10 Q. B. 249.

[9] 20 & 21 Vict. c. 77, ss. 81, 83; 21 & 22 Vict. c. 95, s. 15.

[10] 51 Geo. 3, c. 64, s. 4.

[11] 28 & 29 Vict. c. 78, s. 37, amended by 33 & 34 Vict. c. 20.

[12] 38 & 39 Vict. c. 83, ss. 5 & 6.

[13] Companies Act, 1862 (25 & 26 Vict. c. 89), s. 157.

[14] 4 Anne, c. 3, s. 20.

[15] 11 Geo. 2, c. 19, s. 23.

any debt or other thing in action subject to a trust will, on the appointment of a new trustee, without any assignment, vest in the trustees, if the deed appointing the new trustee contains a declaration by the appointor that it shall so vest;[1] and the like effect follows where a deed by which a retiring trustee is discharged under the Act contains such a declaration by the retiring and continuing trustees and by the other person, if any, empowered to appoint trustees.[2] But these provisions do not extend to "any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament;"[3] this exception being for the purpose of reserving to companies and other bodies the right to require transfers to be made in the statutory form.

Action in new trustees.

It is provided by the Supreme Court of Judicature Act, 1873,[4] that:—

Assignment of debts and choses in action under Judicature Act.

> "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor."

It will be observed that, in order to make an assignment of a chose in action valid at law by virtue of the Act, four things are necessary:—

(1.) The agreement must be in writing signed by the assignor:

(2.) It must be absolute, not purporting to be by way of charge only.

A mortgage of a debt due to the mortgagor, made in the ordinary form of a conveyance with a proviso for redemption, is "an absolute assignment, not purporting to be by way of charge only," within this section,[5] and the result is the same where there is an

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[1] 56 & 57 Vict. c. 53, s. 12 (1). This Act repealed and re-enacted the provisions of sect. 34 of the Conveyancing Act, 1881.

[2] 56 & 57 Vict. c. 53, s. 12 (2).

[3] *Ib.* sect. 12 (3).

[4] 36 & 37 Vict. c. 66, s. 25 (6).

[5] *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D. 239, following *Burlinson* v. *Hall*, 12 *id.* 347, and disapproving of *National Provincial Bank* v. *Harle*, 6 *id.* 626; *Durham* v. *Robertson*, [1898] 1 Q. B. 765.

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assignment subject to a trust.[1] The assignment must in every case be *absolute*, and probably must be of the *whole* debt or other chose in action.[2]

(3.) The chose in action must be legal.[3]

It is hardly necessary to point out that as the owner of an equitable chose in action could not recover it at law there would have been an absurdity in allowing his assignee to do so.

(4.) Notice in writing of the assignment must be given to the debtor or trustee.

The effect is that, until the prescribed notice is given, the assignee must sue in the same manner as if the Act had not been passed, *i.e.*, in the name of the assignor; but after the prescribed notice is given, he can sue in his own name. And the notice produces its full effect even if not given till after the death of the assignor.[4]

Where an assignment is perfected according to the Act, an assignee takes subject to all equities capable of being enforced by the trustee or debtor against him at the date of the assignment,[5] and it follows that an assignment perfected according to the Act confers no new rights on the assignee, but merely gives him a new way of enforcing his rights.

Exceptional contracts not assignable.

Occasionally the subject-matter of a contract is such as to render it not transferable either at law or in equity; as where the contract involves personal skill or confidence; for example, a contract between an author and a publisher that the one shall write and the other publish a book.[6]

Assignment against public policy.

In some cases an assignment is void as being against public policy.

"There are various cases in which public duties are concerned in which it may be against public policy that the income arising for the performance of those duties should be assigned: and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half-pay,[7] where there is a sort of retainer and where the payments

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[1] *Comfort* v. *Betts*, [1891] 1 Q. B. 737; *Wiesener* v. *Rackow*, 76 L. T. 448.

[2] *Durham* v. *Robertson*, *sup.*

[3] See *King* v. *Victoria Co.*, [1896] A. C. 250.

[4] *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

[5] *Ante*, p. 129.

[6] Per Abinger, C. B., *Gibson* v. *Carruthers*, 8 M. & W. 343; *Stevens* v. *Benning*, 1 K. & J. 168; *Robson* v. *Drummond*, 2 B. & Ad. 303; *Griffith* v. *Tower Co.*, [1897] 1 Ch. 21.

[7] *Flarty* v. *Odlum*, 3 T. R. 681; 1 R. R. 791; *Lidderdale* v. *Montrose*, 4 T. R. 248; 2 R. R. 375; and distinguish *Carew* v. *Cooper*, 4 Giff. 619.

which are made to officers from time to time are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties. . . . So, also, where a pension or remuneration is given for a purpose which tends less directly to the public benefit, as . . . the pension given to the Duke of Marlborough." [1]

Assignments forbidden by statute.

It is hardly necessary to state that assignments prohibited by statute are absolutely void. For instance,[2] deferred pay or military reward payable to any officer or soldier of the army, royal marines, and Her Majesty's Indian forces and the Royal Malta Fencible Artillery, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child, or other relative, or to any person in respect of military service (with certain exceptions).[3] Naval pensions payable to an officer in the navy, seaman, or marine, or to an officer's widow, allowances from the compassionate fund, marine half-pay, payments &c., in respect of services in the navy and marines to a subordinate officer, seaman or marine,[4] pensions under the Incumbents' Resignation Act, 1871,[5] are incapable of being assigned.

Maintenance.

"Maintenance" is the maintaining of another person in his suit by one who has no valuable interest in the matter, or an interest arising from relationship, or from the connection between the parties, *e.g.*, as master and servant, or that which charity gives to a man who assists a poor man whom he believes to be oppressed.

Champerty.

"Champerty" is the maintaining of another in his suit in consideration of receiving a share of the proceeds. As being contrary to public policy they are common law offences, and also may be actionable wrongs, and agreements or assignments of that nature cannot be enforced.[6]

So the pay of a naval surgeon; *Apthorpe* v. *Apthorpe*, 12 P. D. 192.

[1] Per Lord Langdale, M. R., *Grenfell* v. *Dean of Windsor*, 2 Beav. 549. See *Davis* v. *Marlborough*, 1 Swanst. 79.

[2] See as to judicial salaries, *Flarty* v. *Odlum*, 3 T. R. 683; 1 R. R. 791.

[3] The Army Act, 1881 (44 & 45 Vict. c. 58), ss. 141. See *Lucas* v. *Harris*, 18 Q. B. D. 127; *Crowe* v. *Price*, 22 Q. B. D. 429.

[4] The Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), s. 4.

[5] 34 & 35 Vict. c. 44; *Gathercole* v. *Smith*, 17 Ch. D. 1. See *Gathercole* v. *Smith*, 7 Q. B. D. 626. *Secus*, as to an annuity granted to a retiring incumbent under the Union of Benefices Act, 1860 (23 & 24 Vict. c. 142); *McBean* v. *Deane*, 30 Ch. D. 520; or the salary of a chaplain to a workhouse; *Re Mirams*, [1891] 1 Q. B. 594.

[6] *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1; *Harris* v. *Brisco*, 17 *id.* 504; *Guy* v. *Churchill*, 40 Ch. D. 481; *Alabaster* v. *Harness*, [1895] 1 Q. B. 339; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437. See notes to *Ryall* v. *Rowles*, 1 Wh. & T. 96; and 6 Law Quarterly, 169.

CHAPTER X.

POLICIES OF ASSURANCE.

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A POLICY of assurance is a contract by which the assuror undertakes to pay a sum of money to the assured on the happening of an event, or to indemnify him from the loss arising from the happening of the event.

Premium.

The consideration paid by the assured is called the premium, and is generally a sum of money paid down or payable annually until the event happens or the policy is allowed to lapse. The most important classes of policies are those on life, on maritime risks, and against fire.

Duty of assured to disclose material facts.

Wilful misrepresentation.

It is the duty of a person seeking to effect a policy of any nature to communicate to the assuror every material fact in his knowledge, and, if he does not do so, the policy may be avoided by the assuror.[1] If any wilful misrepresentation of a material fact is made by the assured, the assuror may avoid the policy.[2]

Innocent misstatement.

The question whether a policy is liable to be avoided by a misstatement made by the assured of a material fact, which, though untrue, is not untrue to his knowledge, is one of some nicety, and probably must receive different answers in the cases of policies on life and policies of marine insurance respectively.

Where the policy is on life, if it is a term of the contract that the statement is true, the policy is voidable if the statement is false.[3] This is in accordance with the general rule as to avoiding contracts.[4] On the other hand, any material misstatement, though

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[1] *Blackburn* v. *Vigors*, 12 A. C. 531; *Lindenau* v. *Desborough*, 8 B. & C. 586; *London Assurance* v. *Mansel*, 11 Ch. D. 363.

[2] *Fitzherbert* v. *Mather*, 1 T. R. 12; 1 R. R. 134.

[3] *Anderson* v. *Fitzgerald*, 4 H. L. C. 484; *Macdonald* v. *Law Union Co.*, L. R. 9 Q. B. 328; *Hambrough* v. *Mutual Co.*, 72 L. T. 140.

[4] Leake on Contracts, 338.

innocent, renders a policy of marine insurance voidable, even where there is no express stipulation to that effect.[1]

Material facts.

Whatever is necessary and essential to enable the assuror to determine what is the extent of the risk against which he undertakes to insure, is a material fact.[2]

Policies on Life.

A policy on life contains a contract by the assuror (almost invariably a company) to pay a sum of money on the death of a specified person.[3] The consideration is generally the payment of an annual sum, called the premium, during the life assured; but occasionally the premiums are only payable during a certain number of years if the assured should so long live, and sometimes, instead of premiums, a sum of money is paid down. Sometimes the policy provides that on the occurrence of certain events the company will pay a share of the profits made by the company to the policy-holder either immediately on the happening of the event or on the death of the person assured; this sum of money is called a "bonus." Sometimes it is provided that instead of the bonus being paid it shall be applied in reduction of the subsequent premiums.

Premium.

Bonus.

Terms of policy.

The ordinary form of a policy on life provides, in consideration of the first payment of the premium, for the payment of the sum named in the policy if the person whose life is assured dies within a year, and for payment of the same sum if he dies after that date and the next premium is paid on the day appointed for payment of it, or within a limited number of days afterwards, called "the days of grace," and so on from year to year. Generally it also provides that the payment of the policy moneys is to be made solely out of the property of the assurance society, and that no member of the society is to be personally liable.

Occasionally the policy contains certain conditions, as for instance, that if the person whose life is assured goes to a tropical country the premium is to be increased.

14 Geo. 3, c. 48.

It being found that the making insurances on lives, or other

[1] *Anderson* v. *Pacific Insurance Co.*, L. R. 7 C. P. 68; *Macdowall* v. *Frazer*, 1 Doug. 260.

[2] *Bates* v. *Hewitt*, L. R. 2 Q. B. 605, per Cockburn, C. J.

[3] *Dalby* v. *India Assurance Co.*, 15 C. B. 387; *Law* v. *London Co.*, 1 K. & J. 223; *Fryer* v. *Morland*, 3 Ch. D. 685.

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events, wherein the assured had no interest, introduced a "mischievous kind of gaming," in 1774 the statute 14 Geo. 3, c. 48, was passed.

Insurable interest.

By this Act all insurances[1] made upon lives or events in which the assured has no interest,[2] or by way of gaming or wagering,[3] are void; the name of the person interested therein must be inserted in the policy;[4] and no greater sum can be recovered from the assuror than the value of the interest of the assured at the time when the policy was effected.[5] The Act does not prevent persons effecting *bonâ fide* insurances upon their own lives.[6] It is not necessary for the assignee of a policy to have any interest in the life assured.[7]

Where a policy is void for want of insurable interest, the premiums paid cannot be recovered from the insurer.[8]

By "interest" in the Act is meant pecuniary interest.[9] But every man is presumed to have a pecuniary interest in his own life, and therefore when an executor sues on a policy effected on the life of and by his testator, he is not bound to show what reason the testator had for making the insurance.[10] And a policy may be effected on A.'s life by B. in trust for A. if both names appear in the policy.[11]

A creditor has an insurable interest in his debtor's life to the amount of his debt, and the policy remains valid though the debt may be paid off in the debtor's lifetime.[12]

A wife has an insurable interest in the life of her husband,[13] a surety in the life of his principal,[14] and one of two joint obligors in a bond in the life of the other.[15]

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[1] This Act does not apply to marine insurances; sect. 4. See 19 Geo. 2, c. 37; and 28 Geo. 3, c. 56.

[2] *Halford* v. *Kymer*, 10 B. & C. 724; *Hebdon* v. *West*, 3 B. & S. 579; *Barnes* v. *London Co.*, [1892] 1 Q. B. 864.

[3] See *Carlill* v. *Carbolic Co.*, [1893] 1 Q. B. 256; and the notes to *Godsall* v. *Boldero*, 2 Sm. L. C. 254.

[4] *Hodson* v. *Observer Co.*, 8 E. & B. 40; *Evans* v. *Bignold*, L. R. 4 Q. B. 622; *Shilling* v. *Accidental Co.*, 2 H. & N. 42.

[5] *Dalby* v. *India Co.*, 15 C. B. 391; 2 Sm. L. C. 262.

[6] See *Wainwright* v. *Bland*, 1 M. & W. 32.

[7] *Ashley* v. *Ashley*, 3 Sim. 149.

[8] *Howard* v. *Refuge Society*, 54 L. T. 644.

[9] *Halford* v. *Kymer*, 10 B. & C. 724; 34 R. R. 553.

[10] *Wainwright* v. *Bland*, 1 M. & Rob. 481; 1 M. & W. 32.

[11] *Collett* v. *Morrison*, 9 Hare, 176.

[12] *Dalby* v. *India Assurance Co.*, 15 C. B. 365. As to the method of estimating the insurable interest, see *Law* v. *London Co.*, 1 K. & J. 223.

[13] *Reed* v. *Royal Exchange*, Peake, Add. Ca. 70.

[14] *Lea* v. *Hinton*, 5 D. M. & G. 823.

[15] *Branford* v. *Saunders*, 25 W. R. 650.

A creditor can only recover the amount of his insurable interest in his debtor's life, and accordingly if he effects several policies, the recovery on one policy is *pro tanto* a bar to recovery on the others.[1]

Indisputable policy.

Sometimes the policy is expressed to be "indisputable"; such a policy can be disputed only on the ground of fraud.[2]

Suicide.

If the assured dies by the hands of justice,[3] or if he commits *felo de se*,[4] the policy is absolutely void, but this is not the case if he commits suicide while of unsound mind;[5] but when the policy contains a condition that it shall be void if the person whose life is assured commits suicide, it is void if he commits suicide while of unsound mind.[6]

Death by felony.

The personal representatives of a man who has insured his life for the benefit of his wife can recover on the policy although the death has been caused by the felonious act of the wife; in such case the money will belong to the estate, and will not be held upon trust for the wife.[7]

Lien for premiums.

Sometimes a stranger to, or part owner of, a policy, who pays the premiums necessary to keep up the policy, acquires a lien on the policy or its proceeds for the amount so paid.[8]

Assignment of policy.

A policy of life insurance is a chose in action, and therefore it was formerly assignable in equity only; it is now assignable at law, so that the assignee can sue in his own name.[9]

Married Women's Property Act, 1882.

Under the Married Women's Property Act, 1882,[10] a married woman may, by virtue of the power of making contracts therein conferred upon her, effect a policy upon her own life, or the life of her husband, for her separate use. The Act[10] also contains a provision enabling a husband or wife to effect a policy on his or her own life by way of settlement for the benefit of the wife, or husband, or children of the assured. If the policy is for the benefit of wife

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[1] *Hebdon* v. *West*, 3 B. & S. 579.

[2] See, as to the effect of a prospectus stating that the polices are indisputable, *Wood* v. *Dwarris*, 11 Exch. 493; *Wheelton* v. *Hardisty*, 8 E. & B. 262, 272.

[3] *Amicable Society* v. *Bolland*, 4 Bli. N. S. 194.

[4] Per Lord Mansfield, *Tyne* v. *Fletcher*, Cowp. 669.

[5] *Horn* v. *Anglo-Australian Insurance Co.*, 7 Jur. N. S. 673; 30 L. J. Ch. 511.

[6] *Clift* v. *Schwabe*, 3 C. B. 437; *White* v. *British Empire Co.*, 7 Eq. 394.

[7] *Cleaver* v. *Mutual Assoc.*, [1892] 1 Q. B. 147.

[8] *Re Leslie*, 23 Ch. D. 552; *Falcke* v. *Scottish Co.*, 34 *Id.* 234; *Re Winchelsea*, 39 *Id.* 168.

[9] *Ante*, p. 132.

[10] 45 & 46 Vict. c. 75, s. 11.

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and children, it seems that they all take as joint tenants.[1] The assured may by the policy, or by any memorandum under his or her hand, appoint trustees, and make provision for the appointment of new trustees, and for the investment of the moneys payable under any such policy.

Marine Insurance.[2]

A policy of marine insurance contains a contract by the assurors, who are generally called "underwriters," owing to the practice of their subscribing their names to the policy, to indemnify the assured against loss by the perils of the sea in respect of ship, freight or cargo. But this statement must be taken with the qualification that the parties may agree, either at the time of making the policy or afterwards, in estimating the value of the thing insured, so that on a total loss the assured is entitled to receive that amount, be it more or less than the true value of the thing.[3] A policy in which the value of the thing insured is not stated is an "open" policy, and in case of loss the value must be proved: if the value is stated, the policy is "valued," and the value agreed upon is conclusive between the parties in case of loss of the thing insured;[4] but, though the valuation is conclusive for the purposes of the contract and of all rights arising therefrom, it is not so for purposes collateral to it; as, for instance, where by reason of an Act of the Legislature of a foreign state the assured is entitled to some additional indemnity.[5]

"Open policy."

"Valued policy."

Contract of indemnity.

A marine policy is a contract of indemnity; and "the general rule of law is that, where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and, if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the

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[1] *Re Seyton*, 34 Ch. D. 511; *Re Davies*, [1892] 1 Ch. 90.

[2] See Arnold on Marine Insurance, 1 Maude & Pollock, 438 *et seq.*

[3] *Irving* v. *Manning*, 1 H. L. C. 307.

[4] *Forbes* v. *Aspinall*, 13 East, 326; 12 R. R. 352; *Barker* v. *Janson*, L. R. 3 C. P. 303; *Lidgett* v. *Secretan*, L. R. 6 C. P. 616; *The Main*, [1894] P. 320.

[5] *Burnand* v. *Rodocanachi*, 7 App. Cas. 333.

full indemnity is entitled to be recouped by having that amount back."[1] The contract "means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance."[2] If, therefore, the assured has effected several policies on the same ship or cargo, he cannot recover in all more than the amount of his loss, or the "valued" amount, as the case may be.[3]

Interest of assured.

At common law it was not necessary that the assured should have any interest in the thing assured, but he had to prove his interest unless the words "interest or no interest" were inserted in the policy.[4] In 1745, however, wager policies, as they are called, upon British ships, or cargoes thereon, were prohibited by 19 Geo. 2, c. 37.

19 Geo. 2, c. 37.

Foreign ships are not included within the statute, and insurances thereon without interest continued valid, provided that it was stated in the policy to be made "interest or no interest."[5] Such insurances, however, are probably now void under 8 & 9 Vict. c. 109.

Assurances made by or for the owners of private ships of war fitted solely to cruise against the enemies of the Crown were excepted;[6] and also assurances on merchandizes or effects from any places in Europe or America in the possession of the crowns of Spain or Portugal.[7]

The assured need not have any interest in the thing insured at the time when the policy is issued; it is sufficient if he is interested at the time of the loss,[8] or even at any time before the loss during the voyage,[9] and he may recover in respect of damage done to goods sold to him on the voyage, not known to him at the time when he purchased them, if the policy is upon the goods "lost or not lost."[10]

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[1] Per Lord Blackburn, *Burnand* v. *Rodocanachi*, 7 App. Cas. 339.

[2] Per Brett, L. J., *Castellain* v. *Preston*, 11 Q. B. D. 386.

[3] *Irving* v. *Richardson*, 1 M. & Rob. 153; *North of England Co.* v. *Armstrong*, L. R. 5 Q. B. 244.

[4] *Lucena* v. *Craufurd*, 3 B. & P. 75; 2 B. & P. N. R. 269, 321; 6 R. R. 623; per Lord Hardwicke, L. C., *Sadlers' Co.* v. *Badcock*, 2 Atk. 556.

[5] See *Thellusson* v. *Fletcher*, 1 Doug. 315; *Craufurd* v. *Hunter*, 8 T. R. 13; 4 R. R. 576; *Cousins* v. *Nantes*, 3 Taunt. 512; 12 R. R. 696.

[6] 19 Geo. 2, c. 37, s. 2.

[7] Sect. 3.

[8] *Rhind* v. *Wilkinson*, 2 Taunt. 237; 11 R. R. 551; *Lower Rhine Assoc.* v. *Sedgwick*, [1898] 1 Q. B. 739.

[9] *Sparkes* v. *Marshall*, 3 Scott, 172.

[10] *Sutherland* v. *Pratt*, 11 M. & W. 296.

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Interest.

An insurable interest is "a right in the property or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party."[1]

An interest to be insurable must be such that the peril insured against would by its proximate effect damage that interest.[2]

Honour policies.

Policies which contravene the statute, being made "interest or no interest," are called "honour" policies.[3]

Broker.

The assured generally employs a broker to effect the policy, and the latter is personally liable to the underwriter for the premiums.[4] The broker has a lien on the policy effected by him, and, if he was employed directly by the assured, his lien extends to the general balance due to him.[5]

"Slip."

A memorandum of an intended policy, generally called "the slip," is initialled by the underwriters. The slip is in practice the complete contract between the parties, and the assured need not communicate to the underwriters facts coming to his knowledge between the initialling of the slip and the issue of the policy.[6]

Form and contents of policy.

A contract of sea insurance must, in order to be valid, be expressed in a policy of sea insurance.[7] The policy must specify the "usual style and firm of dealing of one or more of the persons interested, or of the consignor or consignee of the property insured, or of the person residing in Great Britain who receives the order for effecting the policy, or of the person who gives the order to the agent immediately employed to effect it."[8]

Where the policy relates to a particular ship, or to goods to be shipped on a particular ship, it is the practice to insert the name of the ship; but this is not necessary.[9] Sometimes a policy is effected on goods to be shipped "by any ship or ships." Where a policy is in this form, the risk attaches as soon as the goods are shipped, and it is the duty of the assured to declare the name of the ship to the underwriter.[10] The policy must specify the par-

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[1] *Lucena* v. *Craufurd*, 2 B. & P. N. R. 269, 321; 6 R. R. 623, per Lord Eldon.

[2] *Seagrave* v. *Union Marine Insce. Co.*, L. R. 1 C. P. 320.

[3] See *Roddick* v. *Indemnity Co.*, [1895] 2 Q. B. 380.

[4] *Jenkins* v. *Power*, 6 M. & S. 287; 18 R. R. 375; *Power* v. *Butcher*, 10 B. & C. 340; 34 R. R. 432; *Universo Co.* v. *Merchants' Co.*, [1897] 2 Q. B. 93.

[5] *Ante*, p. 39; *Olive* v. *Smith*, 5 Taunt. 56.

[6] *Lishman* v. *Maritime Co.*, L. R. 10 C. P. 179.

[7] 54 & 55 Vict. c. 39, ss. 91—95; *Home Co.* v. *Smith*, [1898] 2 Q. B. 351.

[8] 28 Geo. 3, c. 56.

[9] *Le Mesurier* v. *Vaughan*, 6 East, 382; 8 R. R. 500.

[10] *Ionides* v. *Pacific Insurance*, L. R. 6 Q. B. 674.

ticular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, under pain of being void.[1]

"Voyage" policy.

The policy may be made for a specified voyage, or for any number of voyages, in either of which cases it is called a "voyage policy;" or for any time not exceeding twelve months,[2] when it is called a "time policy;" or for a voyage and also for time, as for instance, "from Dover to Calais and back for a year;" a policy in this form is called a mixed policy.[3]

Time policy.

Re-insurance.

Re-insurance is where an underwriter procures another underwriter to insure the whole or part of the sum that he has insured.

Double insurance.

Double insurance is where the same risk is insured twice, in which case the total amount of the insurance may exceed the value of the interest of the assured. In this case he can proceed on either policy, leaving the underwriters who pay to sue the other underwriters for contribution.[4]

Risks insured against.

The usual risks insured against are "perils of the sea,"[5] fire, barratry, and capture or detention. "Barratry" is every species of fraud or knavery committed by the master or crew to the prejudice of the assured.[6] The underwriter is liable if the loss is directly caused by the peril insured against, though it would not have occurred but for the concurrent action of some other cause.[7]

If the loss is directly caused by a peril insured against, the underwriter is liable though there has been negligence or misconduct on the part of the assured.[8]

Subject-matter of insurance.

The most common forms of insurance are on the ship or goods, on the profits to accrue from the cargo, which may be described as "profits" generally,[9] on "profits on charter,"[10] on the freight,[11] on money advanced by the captain during the voyage for the use of the ship, on "commissions and privileges" due to him or to the consignee,[12] on money advanced on *bottomry* or *respondentia*,[13] and

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[1] 54 & 55 Vict. c. 39, s. 93. In practice each underwriter writes opposite to his name the sum for which he is to be liable.

[2] *Ib.* sect. 93.

[3] See, as to mixed policies, *Gambles* v. *Marine Co. of Bombay*, 1 Ex. D. 8.

[4] *Newby* v. *Reed*, 1 W. Bl. 416.

[5] See *Hamilton* v. *Pandorf*, 12 A. C. 526.

[6] See *Earle* v. *Rowcroft*, 8 East, 134; 9 R. R. 385.

[7] *Dudgeon* v. *Pembroke*, 2 App. Cas. 284.

[8] *Small* v. *United Kingdom Assoc.*, [1897] 2 Q. B. 311; *Trinder* v. *Thames Assoc.*, [1898] 2 Q. B. 114.

[9] *Eyre* v. *Glover*, 16 East, 218.

[10] *Asfar* v. *Blundell*, [1896] 1 Q. B. 123.

[11] *Forbes* v. *Aspinall*, 13 East, 323; 13 R. R. 801; *Rankin* v. *Potter*, L. R. 6 H. L. 83; *The Bedouin*, [1894] P. 1; *Bensaude* v. *Thames Co.*, [1897] A. C. 609.

[12] *Gregory* v. *Christie*, 3 Doug. 419; *King* v. *Glover*, 2 N. R. 206; *Flint* v. *Le Mesurier*, 2 Park on Insurance, 403.

[13] *Ante*, pp. 117, 118; *Glover* v. *Black*, 3 Burr. 1394.

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on the master's,[1] but not the seamen's wages.[2] Insurances may also be effected on goods intended to be smuggled contrary to the laws of a foreign state,[3] and on the goods of a neutral being carried to an enemy's country, not being contraband of war,[4] and even on contraband of war carried from one neutral port to another.[5]

Voyage policy; attaching of risk.

Where the policy is a "voyage" or "mixed" policy, the voyage must be accurately described. If the insurance is for a particular voyage, the risk does not attach until that particular voyage is commenced.[6] If the insurance is "from" a port, the risk does not attach until the ship sails; but if it is "at and from," she is protected while in the port.[7] If the voyage is to a country generally, it terminates on the arrival at any port in that country; if to a named port, it terminates on the mooring of the ship at the port in the usual place for discharge of cargo.[8] In a time policy the risk attaches from the time mentioned in the policy.

The policy becomes void if there is an unreasonable delay in commencing the voyage;[9] or if there is an improper deviation from the usual course of the voyage.[10]

"Suing and labouring" clause.

The policy generally contains what is called the "suing and labouring" clause, which provides that, in case of loss or misfortune, the assured may "sue, labour and travel" for the defence or recovery of the ship or goods without prejudice to the insurance, and that the underwriters are to contribute. The meaning is that where unusual labour and expense are rendered necessary, owing to a peril insured against, to prevent a loss insured against, the underwriters will contribute, as persons benefited by the expenditure, in the proportions in which they would have had to pay the loss which is avoided by the expenditure.[11]

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[1] *King* v. *Glover*, *sup.*

[2] *Webster* v. *De Tastet*, 7 T. R. 157; 4 R. R. 402.

[3] *Planche* v. *Fletcher*, 1 Doug. 251.

[4] *Barker* v. *Blakes*, 9 East, 283; 9 R. R. 558.

[5] *Hobbs* v. *Henning*, 17 C. B. N. S. 791.

[6] *Simon* v. *Sedgwick*, [1893] 1 Q. B. 303.

[7] *Haughton* v. *Empire Co.*, L. R. 1 Ex. 206; *The Copernicus*, [1896] P. 237; *Hydarnes Co.* v. *Indemnity Co.*, [1895] 1 Q. B. 500.

[8] *Stone* v. *Marine Co.*, 1 Ex. D. 81; *Camden* v. *Cowley*, 1 W. Bl. 417.

[9] *Palmer* v. *Marshall*, 8 Bing. 317; 34 R. R. 628.

[10] *Lavabre* v. *Wilson*, 1 Doug. 291.

[11] *Kidston* v. *Empire Co.*, L. R. 1 C. P. 535; 2 *Id.* 357; *Meyer* v. *Ralli*, 1 C. P. D. 358.

"Memorandum."

The policy invariably contains the "memorandum," which provides that:—

(1.) Specified goods are "warranted free from average, unless general, or the ship be stranded."

(2.) Other specified goods are warranted free from average under 5 per cent.

(3.) All other goods, and also the ship and freight, are warranted free from average under 3 per cent., unless general, or the ship be stranded.[1]

"Total loss." "Partial loss."

A loss is said to be total where the thing insured is totally destroyed, or where it is damaged to such an extent as to justify the owner in abandoning it to the underwriters; it is said to be "partial" where the thing is only partially damaged, or where the assured is liable to contribute in respect of it towards general average.

Constructive total loss.

A total loss is said to be constructive where, though the thing insured exists, it is, by plunder, capture, or the like, lost to the owners,[2] and notice of abandonment is given to the underwriters. The restoration of the thing insured after the commencement of an action upon the policy will not prevent the assured recovering as for a total loss.[3]

Upon abandonment the underwriters are entitled to the things insured and all profits arising therefrom as from the time when the loss occurred.[4]

The ordinary test by which the loss of a ship is determined to be constructively total or only partial is whether a prudent owner, who had not insured, would repair; if he would not, the loss is total.[5]

Warranty.

The term "warranty," as used with reference to policies of assurance, bears a meaning different from that which it bears in a contract for sale.[6] In a policy, "warranty" means an assertion

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[1] See *ante*, p. 120, as to general and particular average.

[2] See, for example, *Goss* v. *Withers*, 2 Burr. 683; *Stringer* v. *English, &c. Co.*, L. R. 5 Q. B. 599; *Allen* v. *Sugrue*, 8 B. & C. 561; 32 R. R. 483; *Dean* v. *Hornby*, 3 E. & B. 180; *Anderson* v. *Royal, &c. Co.*, 7 East, 38; 8 R. R. 589; *Farnworth* v. *Hyde*, 18 C. B. N. S. 835.

[3] *Ruys* v. *Royal Exchange Assurance Co.*, [1897] 2 Q. B. 135.

[4] *The Red Sea*, [1896] P. 20.

[5] *Allen* v. *Sugrue*, 8 B. & C. 561; 32 R. R. 483; *Francis* v. *Boulton*, 73 L. T. 578, as to goods.

[6] *Ante*, p. 66. As to the warranties implied when policies are effected, and their breach, see notes to *Dixon* v. *Sadler*, and *Woolridge* v. *Boydell*, Tudor's L. C. Merc. Law, 136; as to total loss and the law of abandonment, see *Roux* v. *Salvador*, *Id.* 184; as to the underwriters'

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on the part of the assured, either contained in or implied by the policy, on the truth or performance of which the liability of the underwriters depends: so that, if the warranty is broken, the underwriters are not liable in case of loss, even if the loss be unconnected with the breach.[1] In other words, a warranty forms part of the contract.

Representation.

The meaning of "representation,"[2] as used in assurance law, is a statement made by the assured to the underwriter at the time of making[3] or during the negotiation for the policy,[4] of some fact connected with the proposed risk, which, even if included in the policy, is not one of its terms, and therefore need not be strictly complied with; but if material and untrue it will avoid the policy.[5]

Seaworthiness.

A voyage policy, but not a time policy, implies a warranty that the vessel is seaworthy at the commencement of the risk; but even in the case of a time policy, the owner cannot recover if he knowingly and wilfully sends his ship to sea in an unseaworthy condition.[6]

A ship is not seaworthy if it is not in a "fit state, as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the voyage."[7]

"Adjustment."

By "adjustment" is meant the settlement in case of loss between the assured and the underwriters of the amount to be paid by each underwriter.

First. In the case of a valued policy, if the loss be total, the whole sum mentioned in the policy must be paid; if the loss be partial, the sum to be paid bears the same ratio to the value named in the policy as the difference at the port of delivery between the price of the goods damaged and the price of sound goods of a similar nature bears to the latter price; if some only

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liability, or "adjustment of average," see *Lewis* v. *Rucker*, Tudor's L. C. Merc. Law, 246; and as to return of premiums where the underwriters are not liable, see *Tyrie* v. *Fletcher*, *Id.* 265.

[1] *Pawson* v. *Watson*, 2 Cowp. 785; *De Hahn* v. *Hartley*, 1 T. R. 343; 2 T. R. 186; 1 R. R. 221; *Woolmer* v. *Muilman*, 3 Burr. 1419; *Rich* v. *Parker*, 7 T. R. 705; 4 R. R. 552.

[2] As to misrepresentation, see *ante*, p. 64.

[3] *Dawson* v. *Atty*, 7 East, 367.

[4] *Edwards* v. *Footner*, 1 Camp. 530.

[5] *Pawson* v. *Watson*, 2 Cowp. 785; *Behn* v. *Burness*, 1 B. & S. 877; 3 *Id.* 751.

[6] *Gibson* v. *Small*, 4 H. L. C. 353; *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581; 1 Q. B. D. 96; 2 App. Cas. 284; *Thompson* v. *Hopper*, 6 E. & B. 172.

[7] *Hedley* v. *Pinkney*, [1892] 1 Q. B. 64; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455.

of the goods be totally lost, the sum to be paid bears the same ratio to the sum mentioned in the policy as the actual value of the goods lost bears to the actual value of the cargo.[1]

Second. Under an open policy, in case of partial loss to a ship, an arbitrary rule is adopted of making the underwriters pay only two-thirds of the costs of repairs. If the policy be on goods and the loss be total, the amount to be paid is the price at which they were invoiced when loaded on the ship, together with the premium on insurance, and commission.[2] If the loss be partial, the underwriter pays the same ratio of the invoice price, adding to it premium and commission, as the selling price of sound goods bears to the selling price of damaged goods at the port of delivery.[3]

The question of the assignment of policies has been dealt with in a former chapter.[4]

Fire Assurance.

Policies of fire assurance.

Policies of fire assurance "are not, in the nature of them, assignable, nor intended to be assigned, from one person to another, without the consent of the office,"[5] nor have they been made assignable by statute. Upon a sale of the property insured, no interest in the policy or insurance moneys passes to the purchaser unless it has been so agreed.[6]

Contracts of indemnity.

They are contracts of indemnity, the assuror engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings and effects.[7] And it follows, as in other contracts of indemnity, that, upon payment of the amount of the loss, the assuror is entitled to be put in the place of the assured, and to succeed to all the ways and means by which the assured might have protected himself against or reimbursed himself for the loss.[8] Therefore, after a contract for sale of property insured

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[1] *Lewis* v. *Rucker*, 2 Burr. 1167; *Goldsmid* v. *Gillies*, 4 Taunt. 803; 14 R. R. 671; *Tobin* v. *Harford*, 17 C. B. N. S. 528.

[2] *Usher* v. *Noble*, 12 East, 639; 11 R. R. 505.

[3] *Usher* v. *Noble*, *sup.*; *Waldron* v. *Coombe*, 3 Taunt. 162; 12 R. R. 629; *Cator* v. *G. W. Insurance Co.*, L. R. 8 C. P. 552.

[4] *Ante*, p. 132.

[5] *Lynch* v. *Dalzell*, 4 Bro. P. C. 431; quoted by Lord Hardwicke in *Sadlers' Co.* v. *Badcock*, 2 Atk. 557.

[6] *Rayner* v. *Preston*, 18 Ch. D. 1.

[7] *Dalby* v. *India, &c. Assurance Co.*, 15 C. B. 387, per Parke, B. See *ante*, p. 136.

[8] *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; per Cairns, L. C., *Simpson* v. *Thomson*, 3 A. C. 284; *West of England Co.* v. *Isaacs*, [1897] 1 Q. B. 226; *ante*, p. 140.

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under which the purchaser is not entitled to the benefit of the insurance, the vendor, if he is paid the full purchase-money without abatement, cannot also recover or retain the insurance money, for he has suffered no loss.[1] And, as in all cases of assurance, whether on lives, ships, or other things, the assuror must be informed by the party effecting the assurance of all material facts affecting the subject-matter.[2]

Insurable interest.

It is necessary that the party insuring should have an interest or property at the time of insuring, and at the time the fire happens.[3]

Re-instatement of property insured.

In 1774 the statute 14 Geo. 3, c. 78,[4] was passed, which, in case of fires within the City of London and certain other limits, enabled and required the assurors to expend the insurance money upon the property upon request by any person interested in the property or upon suspicion of arson. It has been held that these provisions are not confined to property within the places mentioned in the Act, but are of general application.[5] The section does not apply to insurances of chattels.[6]

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[1] *Castellain* v. *Preston*, 11 Q. B. D. 380.

[2] *Lindenau* v. *Desborough*, 8 B. & C. 586.

[3] *Sadlers' Co.* v. *Badcock*, 2 Atk. 555; *Rayner* v. *Preston*, 18 Ch. D. 1, 7. And see 14 Geo. 3, c. 48, *ante*, p.137.

[4] Sect. 83.

[5] *Ex p. Goreley*, 4 De G. J. & S. 477. But see *Westminster Fire Office* v. *Glasgow, &c. Soc.*, 13 App. Cas. 699.

[6] *Lees* v. *Whiteley*, 2 Eq. 143.

CHAPTER XI.

DEBTS—GUARANTEES.

Debts.

A DEBT is an ascertained sum of money due from one person to another. As a debt must be an *ascertained* sum, damages that may be recovered in an action are not a debt until their amount is ascertained by judgment.[1] As the money must be *due*, rent, or the gale of an annuity, is not a debt till it becomes due.[2] But a debt is not the less a debt because the payment is deferred until the happening of an event which must happen.[3] On the other hand, a contract to pay a certain sum of money on the happening of an event which may never happen does not create a debt unless and until the event happens.[4] A liability of this nature is sometimes called a contingent debt.

Debt must be ascertained sum—and due.

An "equitable debt" is a liquidated sum of money owing in equity from one person to another;[5] *e.g.*, where a trustee holds a sum of money in trust for his *cestui que trust* absolutely; but "a trustee is not an equitable debtor to the *cestui que trust* until there is money in his hands which he ought to pay to his *cestui que trust*, or until he has made himself personally liable to pay money to his *cestui que trust* by reason of some breach of trust or default in the performance of his duties as trustee."[6]

Equitable debts.

A married woman is not in the position of an ordinary debtor, even though she has separate estate;[7] she cannot be made a

Married woman.

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[1] *Re Charles*, 14 East, 197; *Jones* v. *Thompson*, E. B. & E. 63.

[2] See Co. Litt. 292 b. See per Lindley, L.J., *Webb* v. *Stenton*, 11 Q. B. D. 526.

[3] Co. Litt. 292 b; *Goss* v. *Nelson*, 1 Burr. 226. "Due" may mean either "owing" or "payable," according to the context; *Ex p. Kemp*, 9 Ch. 383; *Re Stockton, &c. Co.*, 2 Ch. D. 103.

[4] *Ex p. Kemp, sup.*; *Booth* v. *Trail*, 12 Q. B. D. 8.

[5] Per Lindley, L.J., *Webb* v. *Stenton*, *sup.*

[6] Per Fry, L.J., *Id.* p. 530.

[7] *Re Grissell*, 12 Ch. D. 490, per Cotton, L.J.; *Pelton* v. *Harrison*, [1892] 1 Q. B. 118.

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bankrupt unless she trades separately,[1] and she cannot be committed to prison under the Debtors Act.[2]

Interest on debts.

It has never been the practice by our law to allow interest upon all debts merely on the ground of delay in payment,[3] whether upon money lent or money due for goods sold,[4] unless by agreement or mercantile usage; nor at common law could damages be given for non-payment of such debts. But interest may be payable on debts—(1) at common law; (2) in equity, in certain cases; (3) as damages, by statute.[5]

At common law.

(1) At common law, and in equity, following the law,[6] interest is not payable on a debt except (i) under an express contract to pay interest; (ii) under a contract implied from the course of dealing between the parties[7] or the usage of trade; (iii) under a written contract to pay a sum of money on demand, or on a certain day, interest is payable as from the time of demand made, or from the day appointed for payment;[8] (iv) by the usage of trade, where the debt is secured by a bill of exchange or promissory note.[9]

In equity.

(2) Interest is payable in equity on money wrongfully, fraudulently, or vexatiously withheld,[10] and equity usually decreed interest in cases of purely equitable demands—for instance, in suits against trustees who misapply trust moneys, and in suits for equitable waste;[11] or where money would have become payable as an ascertained sum under a contract if the defendant had not wrongfully prevented anything from becoming due; in which case the sum would be treated as a debt in equity, though it is not a debt at law, and, if it would have carried interest in case it had become payable at law under the contract, interest will be payable in equity.[12]

Trustees or executors improperly retaining trust moneys instead

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[1] *Re Lynes*, [1893] 2 Q. B. 113; *Re Hewett*, [1895] 1 Q. B. 328; *Re A Debtor*, [1898] 2 Q. B. 576.

[2] *Scott* v. *Morley*, 20 Q. B. D. 120.

[3] Per Kay, L.J., *L. C. & D. R. Co.* v. *S. E. R. Co.*, [1892] 1 Ch. 148; [1893] A. C. 429.

[4] *Calton* v. *Bragg*, 15 East, 223; 13 R. R. 451; *Re Edwards*, 61 L. J. Ch. 22.

[5] See, as to interest, Leake on Contracts, Pt. V. Ch. I. s. 4, pp. 943 *et seq.*

[6] *Webster* v. *British Empire Co.*, 15 Ch. D. 178, where the cases are collected; and *L. C. & D. R. Co.* v. *S. E. R. Co.*, *sup.*

[7] *Higgins* v. *Sargent*, 2 B. & C. 348; 26 R. R. 379.

[8] *Lowndes* v. *Collens*, 17 Ves. 27.

[9] *Calton* v. *Bragg*, 15 East, 223; 13 R. R. 451.

[10] *Meredith* v. *Bowen*, 1 Keen, 270; *Pearse* v. *Green*, 1 Jac. & W. 135; 20 R. R. 258.

[11] See M. L. R. P. p. 46; *Phillips* v. *Homfray*, [1892] 1 Ch. 465.

[12] Per Lindley, L.J., in *L. C. & D. R. Co.* v. *S. E. R. Co.*, [1892] 1 Ch. 140—143.

of investing or paying them over, are generally charged with simple interest, and in some cases under special circumstances with compound interest.[1]

Mortgage debts.

Where a mortgage deed contains a covenant for payment of the mortgage debt at a fixed date and of interest thereon in the meantime, but no covenant for payment of any subsequent interest, the Court will allow subsequent interest at the same rate, but apparently not so as to exceed £5 per cent.[2]

By statute.

(3) By the Civil Procedure Act, 1833,[3] upon all debts the jury may allow interest at the current rate from the time fixed for payment by the written instrument, if any, by virtue of which the debt is payable[4] at a time certain,[5] or otherwise from the time when a written demand of payment has been made giving notice that interest will be charged from the date of demand.[6] Also, the jury may give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass to goods, and over and above the money recoverable in all actions on policies of assurance.[7]

It will be observed that a discretion is given to the jury to say whether, under all the circumstances of a case, it is one in which interest ought to be allowed or not: and a judge of fact will act as a jury.[8]

Interest on calls.

The liability of a person to contribute to the assets of a company being wound up under the Companies Acts creates a debt;[9] therefore a notice upon a contributory of a call made in winding up, requiring its payment by a given day and stating that if not paid by that day interest will be charged, will make interest to be payable on the call under the above statute.[10]

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[1] Seton, 985, 987; *Re Emmet*, 17 Ch. D. 142; *Re Hulkes*, 33 Ch. D. 552; *Re Sharpe*, [1892] 1 Ch. 169; *Christmas* v. *Jones*, [1897] 2 Ch. 190.

[2] *Re Roberts*, 14 Ch. D. 49; *Ex p. Furber*, 17 Ch. D. 191; *Mellersh* v. *Brown*, 45 Ch. D. 225. As to a mortgagee's right to six months' interest in lieu of notice to pay off, see *Smith* v. *Smith*, [1891] 3 Ch. 550; *Fitzgerald* v. *Mellersh*, [1892] 1 Ch. 385.

[3] 3 & 4 Will. 4, c. 42, s. 28. See *L. C. & D. R. Co.* v. *S. E. R. Co.*, [1892] 1 Ch. 140; [1893] A. C. 429.

[4] *Taylor* v. *Holt*, 3 H. & C. 452.

[5] See *L. C. & D. R. Co.* v. *S. E. R. Co.*, *sup.*

[6] *Ward* v. *Eyre*, 15 Ch. D. 130; *Rhymney R. Co.* v. *Rhymney Iron Co.*, 25 Q. B. D. 146; *Re Edwards*, 61 L. J. Ch. 22.

[7] 3 & 4 Will. 4, c. 42, s. 29.

[8] See per Hall, V.-C., in *Hill* v. *S. Staffordshire R. Co.*, 18 Eq. 170; and see, on sect. 29, *Phillips* v. *Homfray*, [1892] 1 Ch. 465.

[9] *Post*, Chap. XVI. See 25 & 26 Vict. c. 89, ss. 16, 75.

[10] *Barrow's Case*, 3 Ch. 784.

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There is a statutory provision as to payment of interest by way of damages where a bill of exchange is dishonoured.[1]

Compound interest.

Compound interest cannot be claimed, except under a contract express or implied from the mode of dealing with former accounts or from custom.[2]

Debts may be divided into (1) debts of record; (2) judgment debts; (3) specialty debts; and (4) simple contract debts.

Debts of record.

A debt of record is one which appears to be due on the inspection of the records of a Court of Record.[3]

The principal debts of record are Crown debts,[4] recognizances,[5] and judgment debts.

Crown debts.

Crown debts are entitled to priority in the administration of the estate of a deceased person,[6] unless administered in bankruptcy;[7] and a surety to the Crown, who has paid the debt of his principal, is entitled to the same priority.[8]

Recognizances.

A recognizance of record is an obligation in the form of an acknowledgment made before a judge or other officer having authority for that purpose, and enrolled[9] in a Court of Record, of a debt expressed to be due to the Crown, to an officer of the Court, or to the plaintiff in the action, and is conditioned to secure various objects. The remedy on a recognizance of record in the High Court is by *scire facias*.[10]

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[1] *Post*, p. 182.

[2] *Fergusson* v. *Fyffe*, 8 Cl. & F. 121; *Crosskill* v. *Bower*, 32 Beav. 86; *Williamson* v. *Williamson*, 7 Eq. 542.

[3] "Every Court of Record is a King's Court, albeit another may have the profit;" Co. Litt. 117 b: *ib.* 260 a. Some Courts can fine and imprison, some can fine only, as a court leet, some can neither fine nor imprison, as a court baron. No Court can fine or imprison which is not a Court of Record; and if Parliament creates a Court with power to fine or imprison, it is a Court of Record; *Gregory's Case*, 6 Rep. 19*b*; *Griesley's Case*, 8 Rep. 38*a*; *Godfrey's Case*, 11 Rep. 42*a*; *Grenville* v. *College of Physicians*, 12 Mod. 386.

[4] M. L. R. P. 389; Elph. & Cl. on Searches, 78; 1 Cruise, Dig. 60.

[5] 2 Bl. 465; Statutes Merchant, Statutes Staple, and recognizances in the nature of a Statute Staple were acknowledgments of debt in writing before officers appointed for that purpose and enrolled of record. See *Underhill* v. *Devereux*, 2 Wms. Saund. 69 f, note (*s*). The Acts under which they existed were repealed by 26 & 27 Vict. c. 125.

[6] See *Re Bentinck*, [1897] 1 Ch. 673.

[7] Bankruptcy Act, 1883, s. 150. See Chap. XVIII.

[8] *Re Churchill*, 39 Ch. D. 174.

[9] *Glynn* v. *Thorpe*, 1 B. & Ald. 153 (now in most cases in the Central Office; R. S. C. Ord. LXI. r. 1).

[10] Leake on Contracts, 141. A *scire facias* is a judicial writ founded upon some record, and requires the person against whom it is issued to show cause why the party bringing it should not have advantage of such record, or why the record should not be annulled and vacated. It is considered in law as an

Judgment debts include debts appearing to be due by the judgment of a Court of Record or of an inferior Court. "To constitute a judgment debt the judgment must be not interlocutory but final, for the payment of a specific sum of money, upon which there is nothing left to be done but to compute interest, and the party must also have an actual right to receive the money."[1] Judgment debts.

By statute a judgment debt carries interest at £4 per cent. from the time of entering up judgment until satisfaction, and such interest may be levied under a writ of execution on such judgment.[2] Judgments of County Courts do not, but judgments of inferior Courts in existence at the passing of this statute do, carry interest.[3] Interest on.

When judgment has been recovered for money due on a covenant, interest is payable at the rate of £4 per cent., and not at the rate which may be provided by the covenant.[4]

A judgment creditor is entitled, on the death of the judgment debtor, to be paid out of his personal estate in priority to specialty and simple contract creditors,[5] provided his judgment is, in accordance with 1 & 2 Vict. c. 110 and 2 & 3 Vict. c. 11, registered or re-registered within five years of the death of the debtor.[6] But where the estate of the deceased debtor is insolvent, it may at the instance of a creditor be administered in bankruptcy,[7] in which case the judgment creditor loses his priority. Priority of judgment creditors.

Sometimes it is wished to place a creditor in the same position as if he had recovered judgment, so as to entitle him to sue out execution[8] at any moment. In order to effect this the debtor gives to the solicitor of the creditor an authority, called a warrant of attorney,[9] to enter up judgment in an action to be brought by the Warrant of attorney.

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action, and, though the writ of *scire facias* is not mentioned in the Judicature Act, it can still be issued; *Portal* v. *Emmens*, 1 C. P. D. 201, 664; *Kipling* v. *Todd*, 3 C. P. D. 350.

[1] Per Kindersley, V.-C., *Garner* v. *Briggs*, 27 L. J. Ch. 483, 485. See a discussion as to what are judgments, Elph. & Clark, Searches, 24. And see *Re Riddell*, 20 Q. B. D. 318, 512; *Ex p. Alexander*, [1892] 1 Q. B. 216; and *Re Binstead*, [1893] 1 Q. B. 199, as to what is a "final judgment" within the Bankruptcy Act, 1883.

[2] 1 & 2 Vict. c. 110, s. 17.

[3] *Reg.* v. *County Court of Essex*, 18 Q. B. D. 704.

[4] *Ex p. Fewings*, 25 Ch. D. 338.

[5] *Berrington* v. *Evans*, 3 Y. & C. 384.

[6] 23 & 24 Vict. c. 38, ss. 3, 4. See *Van Gheluive* v. *Nerinckx*, 21 Ch. D. 189.

[7] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125, amended by Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 21. See *Re Williams*, 36 Ch. D. 573.

[8] See *post*, Chap. XVII.

[9] See the form, 2 K. & E. 202.

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creditor against the debtor for an amount specified in the warrant, and a defeasance stating the events upon which and the amount for which execution is to be issued on the judgment, and how the moneys levied are to be applied.

The warrant is void unless the three conditions following are satisfied:—

(1.) It must be attested by a solicitor of the Supreme Court "on behalf of the person giving the warrant, expressly named by him, and attending at his request to inform him of the nature and effect of the warrant before it is executed." The solicitor must in the attestation describe himself as solicitor for the person executing the same, and state that he executes as such attorney.[1]

(2.) The warrant or a true copy of it must be filed in the Bills of Sale Department of the Central Office within 21 days after execution.[2]

(3.) The defeasance, if any, must be written on the same paper or parchment as the warrant, before filing.[3]

Specialty debts.

A specialty debt is a debt created by deed.

Simple contract debts.

A simple contract debt is one which does not fall under either of the other classes, and may be due under a parol contract, express or implied, in writing or oral. It includes debts under bills of exchange or promissory notes.[4]

There was formerly a distinction between the specialty and simple contract creditors of a deceased person as to priority of payment, to the advantage of the former; but this distinction has now been removed by statute.[5] The Act does not affect any lien, charge, or other security that the creditor may have for the payment of his debt. A specialty creditor has still an advantage over a simple contract creditor with regard to the operation of the Statutes of Limitation.[6] If the heirs of the debtor are bound by the deed (that is, if the debtor covenanted that he or his heirs should pay), the specialty creditor can sue the devisee or the heir of the debtor, and obtain judgment to the value of the lands taken by descent or devise from the debtor.[7] By the effect of the Con-

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[1] 32 & 33 Vict. c. 62, s. 24.

[2] *Ib.* s. 26; Central Office Practice Rules (25).

[3] 32 & 33 Vict. c. 62, s. 26.

[4] *Post*, Chap. XII.

[5] 32 & 33 Vict. c. 46. See *Re Bentinck*, [1897] 1 Ch. 673.

[6] *Post*, Chap. XIX.

[7] 11 Geo. 4 & 1 Will. 4, c. 47; *Re Hedgely*, 34 Ch. D. 379.

veyancing Act, 1881,[1] all covenants made after 1881 bind the heir or devisee so as to enable the covenantee to maintain an action against the heir or devisee personally. Where a person dies insolvent, the same rules now apply as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, as may be in force for the time being under the law of bankruptcy with respect to the estates of bankrupts.[2]

Place of payment.

It may be here noted that generally it is the duty of the debtor to seek and tender payment to his creditor, unless a place is specified for payment of the debt; if several places are named, it is for the creditor to select the place at which he will be paid, and there can be no default in payment until he has done so.[3]

Locality of debts.

Bequests by will of property in a named place have been held to include debts due to the testator from persons in that place.[4]

Demand of payment.

Where there is a present debt and a promise to pay on demand, it is not necessary to demand payment before suing; but it is otherwise on a promise to pay a collateral sum (*e.g.*, as surety) on request, for there the request must be made before suing.[5]

Payment.

Payment of a debt may be made without actual payment in money where the parties agree to set off a demand of money on the one side against a demand of money on the other; as when they account with each other, and sums of money are stated to be due on one side and sums of money to an equal amount on the other.[6]

A mere agreement (not under seal) between debtor and creditor that the debt shall be discharged by payment (without variation of time or place) of a smaller sum of money, or that the creditor shall accept payment by instalments instead of payment at the date at which the debt was originally made due, cannot be enforced; and payment of part of the debt on the day and at the place appointed cannot operate as a satisfaction of the whole,[7] unless some further consideration is given by the debtor;[7] but if

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[1] 44 & 45 Vict. c. 41, s. 59.

[2] Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10. As to the rules in question, see *post*, Chap. XVIII.

[3] *Thorn* v. *City Rice Mills*, 40 Ch. D. 357; Leake, Contr. 734. See Litt. s. 340 *et seq.*; Co. Litt. 210a.

[4] *Guthrie* v. *Walrond*, 22 Ch. D. 575, and cases there cited.

[5] See *Re Brown*, [1893] 2 Ch. 300.

[6] See as to what will support a plea of payment, *White's Case*, 12 Ch. D. 517, per Brett, L. J.; Leake, Contr. 766 *et seq.*

[7] *Foakes* v. *Beer*, 9 App. Cas. 605; *Underwood* v. *Underwood*, [1894] P. 204.

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Release—satisfaction.

there is anything which amounts to a new consideration and a new benefit to the creditor, that will do,[1] as, for example, where payment is made at an earlier day or at a different place.[2] But a release or acquittance under seal is valid and binding;[3] and "a creditor might accept anything in satisfaction of his debt except a less sum of money. He might take a horse or a canary, or a tomtit, if he chose, and that was accord and satisfaction: but he could not take 19*s.* 6*d.* in the pound; that was *nudum pactum*."[4]

Giving negotiable security.

A negotiable security, such as a cheque, may operate as a satisfaction of a debt of greater amount if it is given and accepted in satisfaction;[5] but the mere fact that a cheque sent by the debtor in satisfaction is kept by the creditor is not conclusive that there has been an accord and satisfaction, but is only evidence thereof.[6]

Accord and satisfaction.

If payment is not made when the money is due, there is a breach of contract, and the creditor has a right of action for damages. If he agree after breach to accept any tender or offer made by the debtor, his right of action will be discharged by delivery or performance of what is so agreed upon. This is called an "accord and satisfaction," and is a good defence to an action, provided the agreement be executed. It may consist in payment of the money or in the delivery of goods or performance of work or services; if it be payment of the debt, it operates in such cases not as a performance and discharge of the contract, but as satisfaction of the cause of action for the breach. But accord alone without satisfaction, *i.e.*, actual performance of the thing agreed upon, is no answer to an action for breach of the contract.[7]

Guarantees.

A guarantee is a contract by which one person, called the surety, makes himself collaterally liable for the debt of, or the performance of a contract by, another person, called the principal.

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[1] Per Cotton, L. J., *Bidder* v. *Bridges*, 37 Ch. D. 406, 417.

[2] Co. Litt. 212 b, per Lord Blackburn, *Foakes* v. *Beer*, *sup.*, at 616.

[3] *Ib.*; and per Lord Selborne, C., 9 App. Cas. 612, 613.

[4] Per Jessel, M. R., *Couldery* v. *Bartrum*, 19 Ch. D. 394, 399.

[5] *Goddard* v. *O'Brien*, 9 Q. B. D. 37; *Bidder* v. *Bridges*, 37 Ch. D. 406.

[6] *Day* v. *McLea*, 22 Q. B. D. 610; *Ackroyd* v. *Smithies*, 54 L. T. 130; *Henderson* v. *Underwriters' Assoc.*, 65 L. T. 616.

[7] See this discussed in Leake on Contracts, 755, 765; *Cumber* v. *Wane*, 1 Sm. L. C. 325, and notes.

Guarantees may be divided into two classes :—[1]

(1) Where the consideration is entire; in which case the guarantee necessarily remains in force during the whole time for which it was originally given: as, for example, where, in consideration of A. granting a lease to B., C. guarantees the performance of the covenants by B. In this case, as soon as the lease is granted, there is nothing more for A. to do, and the guarantee necessarily lasts during the whole term of the lease. Where consideration given once for all.

(2) Where the consideration is supplied from time to time. In this case, unless the contrary appears in the agreement, the guarantor may at any time terminate the liability as to matters subsequent to such determination. An example is where a guarantee is given to secure an account current at a banker's, or a balance of running account for goods delivered. Where consideration supplied from time to time.

Where several persons with the privity of each other become sureties for the same debt or contract, whether they become bound by the same or different instruments,[2] they are co-sureties. On the other hand, it is possible for persons to become sureties for the same principal without becoming co-sureties; as, for instance, where each by a separate contract becomes surety for part of his principal's debt; or where one becomes surety only in default of payment by the principal and the other surety.[3] Co-sureties.

A co-surety who paid more than his own proportion of the principal's debt can obtain contribution from his co-surety.[4] A co-surety against whom judgment has been obtained or a claim proved for more than his proportion, can, before he has paid anything, obtain an order that the co-surety pay his proportion to the creditor and that the creditor shall not enforce his claim against him for the full amount, or an order that the co-surety shall indemnify him, when he has paid his proportion, against all further liability.[5] All the co-sureties are entitled to the benefit of any security which any one of them has obtained from the principal debtor.[6] Contribution. Securities.

[1] *Lloyds* v. *Harper*, 16 Ch. D. 290.

[2] *Mayhew* v. *Crickett*, 2 Swanst. 185; 19 R. R. 57.

[3] *Coope* v. *Twynam*, T. & R. 426; 24 R. R. 89; *Craythorne* v. *Swinburne*, 14 Ves. 160; 9 R. R. 264.

[4] *Pendlebury* v. *Walker*, 4 Y. & C. 424; *Ex p. Snowdon*, 17 Ch. D. 44; *Re Ennis*, [1893] 3 Ch. 242; *Ellesmere Co.* v. *Cooper*, [1896] 1 Q. B. 75.

[5] *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

[6] *Steel* v. *Dixon*, 17 Ch. D. 825; *Berridge* v. *Berridge*, 44 Ch. D. 168.

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Statute of Frauds—guarantee must be in writing.

It is provided by the Statute of Frauds[1] that—

> "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

The promise must be made to the person to whom the principal debtor is liable, so that a promise to A. to pay B. a debt due from A. to B. is not within the statute.[2] It must be a promise to answer for the debt, &c. of another for which that other remains liable;[3] and there must be an absence of any liability on the part of the defendant or his property except such as arises from his special promise.[4] An agreement to give a guarantee is within the statute.[5]

Mercantile Law Amendment Act—consideration for guarantee need not appear in writing.

The word "agreement" includes the consideration as well as the promise, and therefore this statute was held not to be satisfied unless the consideration was stated.[6] But in this respect the law was altered by the Mercantile Law Amendment Act, 1856,[7] which provides that no such promise "shall be deemed invalid to support an action, suit, or other proceeding against the person by whom such promise shall be made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document."

The effect of this enactment is to allow parol evidence to be given as to the consideration, but it does not allow such evidence to be given to vary or alter the written contract.[8]

The Partnership Act, 1890,[9] repealing sect. 4 of the Mercantile Law Amendment Act, 1856, provides that—

Continuing guarantee to or in respect of firm.

> "A continuing guaranty given either to a firm, or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions

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[1] 29 Car. 2, c. 3, s. 4 (2).

[2] *Eastwood* v. *Kenyon*, 11 A. & E. 438.

[3] *Birkmyr* v. *Darnell*, 1 Sm. L. C. 287, and notes; *Re Hoyle*, [1893] 1 Ch. 84; *Guild* v. *Conrad*, [1894] 2 Q. B. 885.

[4] *Sutton* v. *Grey*, [1894] 1 Q. B. 285.

[5] *Mallet* v. *Bateman*, L. R. 1 C. P. 163.

[6] *Wain* v. *Warlters*, 1 Sm. L. C. 310, and notes; *Saunders* v. *Wakefield*, 4 B. & Ald. 595; 23 R. R. 409; *Hawes* v. *Armstrong*, 1 Bing. N. C. 761.

[7] 19 & 20 Vict. c. 97, s. 3.

[8] *Holmes* v. *Mitchell*, 7 C. B. N. S. 361. See notes to *Birkmyr* v. *Darnell*, 1 Sm. L. C. 287.

[9] 53 & 54 Vict. c. 39, s. 18.

by any change in the constitution of the firm to which, or in the firm in respect of the transactions of which, the guaranty was given."[1]

Different contracts of suretyship.

A contract of guarantee may be one to which the creditor is a party, or it may be a contract, either express or implied, between the principal and surety only, to which the creditor is a stranger.[2] In the latter case the persons who, as between themselves, are in the position of sureties are, with regard to the creditor, in the position of principals.[2]

Duty of creditor to surety.

When the creditor is a party to the guarantee, the concealment from the surety with the knowledge of the creditor of any material part of his contract with the debtor, which might affect the responsibility of the surety, will avoid the guarantee;[3] but there must be something which amounts to fraud.[4]

Discharge of surety; material alteration; release of debtor, or giving time; loss of securities.

If a written guarantee is altered in any material particular after it has been signed by a surety, that surety is discharged.[5]

If the creditor releases the principal, or gives him time, without expressly reserving all rights against the surety, the surety is discharged.[6] Also, if the contract between the creditor and the debtor is varied so as to alter the position of the surety;[7] or if the creditor gives up or negligently loses any security to the benefit of which the surety would be entitled;[8] or if the creditor releases a co-surety, unless there is no right to contribution.[9]

Surety's right to securities of creditor.

A creditor, who has been paid by a surety, is bound to give to the surety the benefit of every security which he has received either at the time when the guarantee was given,[10] or subsequently,[11] whether the surety knew of their existence or not.

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[1] As to the old law, see *Spiers* v. *Houston*, 4 Bli. N. S. 515; *Cambridge University* v. *Baldwin*, 5 M. & W. 580.

[2] *Duncan* v. *N. & S. Wales Bank*, 6 App. Cas. 11, per Lord Selborne, L. C.

[3] *Pidcock* v. *Bishop*, 3 B. & C. 605; 27 R. R. 430; *Lee* v. *Jones*, 17 C. B. N. S. 482.

[4] *North British Assur. Co.* v. *Lloyd*, 10 Ex. 523.

[5] *Davidson* v. *Cooper*, 11 M. & W. 778; 13 *Id.* 343; *Ellesmere Co.* v. *Cooper*, [1896] 1 Q. B. 75.

[6] *Bateson* v. *Gosling*, L. R. 7 C. P. 13; *Oriental Corp.* v. *Overend*, 7 Ch. 142, 150; *Clarke* v. *Birley*, 41 Ch. D. 434; *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313; *Rees* v. *Berrington*, 2 W. & T. L. C. 562.

[7] *Holme* v. *Brunskill*, 3 Q. B. D. 495; *Bolton* v. *Buckenham*, [1891] 1 Q. B. 278; *Polak* v. *Everett*, 1 Q. B. D. 669.

[8] *Bolton* v. *Salmon*, [1891] 2 Ch. 48; *Rainbow* v. *Juggins*, 5 Q. B. D. 138, 422.

[9] *Ward* v. *Nat. Bank of N. Z.*, 8 App. Cas. 764; *Mercantile Bank* v. *Taylor*, [1893] A. C. 317.

[10] *Newton* v. *Chorlton*, 10 Hare, 651; *Capel* v. *Butler*, 2 S. & St. 457; *Dering* v. *Winchelsea*, 2 W. & T. L. C. 535.

[11] *Lake* v. *Brutton*, 8 De G. M. & G. 441; *Pledge* v. *Buss*, Johns. 663; *Forbes* v. *Jackson*, 19 Ch. D. 615.

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The Mercantile Law Amendment Act, 1856, provides:—[1]

> "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable." [2]

A co-surety who has paid the creditor and taken an assignment of the securities is entitled, under this section, to sue his co-surety for the full amount of the debt, but he can actually recover only the amount which the co-surety is justly bound to contribute.[3]

Right to indemnity from principal.

A surety has a right to be indemnified by his principal, and can recover from his principal all that he has been under a reasonable obligation and necessity to pay.[4]

Right of surety to compel debtor to pay.

Under some circumstances the surety has an equitable right to take proceedings to compel the principal debtor to pay the debt when due, whether the surety has been sued or not,[5] and the surety may sometimes compel the creditor to proceed against the debtor.[5]

Where each debtor is principal.

In guarantees of the class where, so far as the creditor is concerned, each debtor is a principal debtor, and the contract of suretyship exists between the debtors only, the creditor does not lose his remedies against one of the debtors by his course of

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[1] 19 & 20 Vict. c. 97, s. 5.

[2] See *Lightbown* v. *M'Myn*, 33 Ch. Div. 575; *Batchellor* v. *Lawrence*, 9 C. B. N. S. 543.

[3] *Re Parker*, [1894] 3 Ch. 400.

[4] See notes to *Lampleigh* v. *Brathwait*, 1 Sm. L. C. 136, 149.

[5] *Ranelaugh* v. *Hayes*, 1 Vern. 189; *Padwick* v. *Stanley*, 9 Hare, 627; *Nisbet* v. *Smith*, 2 Bro. C. C. 582; *Wright* v. *Simpson*, 6 Ves. 734; *Newton* v. *Chorlton*, 10 Hare, 646, 652. See *Hayes* v. *Ward*, 1 Hare & Wallace, American Leading Cases, 412 *et seq.*

dealing with the other of them.[1] But it is quite consistent with this that, where one debtor is in fact a surety for the other, the creditor is not to be at liberty, after he has received notice of this fact, to do anything which prejudices the right of one debtor against the other, or to refuse, after he has received all that is due to him, to give effect to the rights of one debtor against the other.[2]

Creditor not entitled to securities of surety.

It has recently been held that a creditor is not entitled to the benefit of securities which have been given by the principal debtor to the surety.[3]

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[1] *Ward* v. *National Bank of New Zealand*, 8 App. Cas. 755.

[2] *Duncan* v. *N. & S. Wales Bank*, 6 App. Cas. 12; *Davies* v. *Stainbank*, 6 De G. M. & G. 679, 694; *Overend* v. *Oriental Corp.*, L. R. 7 H. L. 348; *Rouse* v. *Bradford Bank*, [1894] A. C. 586.

[3] *Re Walker*, [1892] 1 Ch. 621, Stirling, J.

CHAPTER XII.

NEGOTIABLE INSTRUMENTS.

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Negotiable instrument described.

A NEGOTIABLE instrument is a document embodying a contract to pay money to a person named, or his order (which is signified by an indorsement on the instrument), or to the bearer of the document,[1] and possessing certain peculiar qualities which will be best understood by considering such instruments as being exceptions to the operation of two general rules of English law, viz., the rules (1) that no man can transfer a better title to a chattel personal than he himself possesses, except only by a sale in market overt;[2] and (2) that a *chose in action* cannot, at common law, be assigned so as to give to the assignee a right to sue on the contract in his own name.[3]

As to the first rule :—

"The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet.* To this there are some exceptions; one of which arises out of the rule of the law merchant as to negotiable instruments. These, being part of the currency, are subject to the same rule as money: and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder."[4]

Negotiable instrument represents money.

An instrument entitling the holder to a sum of money is treated as the representative of money, and as subject to the same rules as the money which it represents; and it has been long settled that the right to money is inseparable from the possession of it;[5] "the property in current coin passes by delivery of it, and the actual possessor of the coin, even if he has stolen it, can by delivery confer

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[1] See *Partridge* v. *Bank of England*, 9 Q. B. 396, 406, 424; *Plimley* v. *Westley*, 2 Bing. N. C. 251; see as to bills of exchange, the Act of 1882 (45 & 46 Vict. c. 61), s. 8 (4).

[2] *Ante*, p. 40.

[3] *Ante*, p. 125.

[4] Per Willes, J., *Whistler* v. *Forster*, 14 C. B. N. S. 257—8; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201.

[5] Per Best, J., *Wookey* v. *Pole*, 4 B. & Ald. 6; 22 R. R. 594.

a good title upon another who receives it honestly."[1] The decisions as to the negotiability of certain instruments "proceed upon the nature of the property, viz., money, to which such instruments give the right, and which is itself current; and the effect of the instruments, which either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it."[2]

"In the case of goods, the property, except in market overt, can only be transferred by the owner, or some person having either an express or implied authority from him; and no one can, by his contract or delivery, transfer more than his own right, or the right of him under whose authority he acts. But the Courts have considered these instruments—either promises or orders for the payment of money, or instruments entitling the holder to a sum of money—as being appendages to money and following in the nature of their principal."[3]

"The holder *bonâ fide* and for a valuable consideration of a bank note or bill of exchange has a good title against all the world; because, in the case of bank notes, they are considered as money and pass as such, and it is essential for the purposes of trade that delivery should give a perfect title; and because, in the case of bills of exchange, this is the law and custom of merchants."[4]

Negotiability —how created.

The quality of negotiability must be derived either from the law merchant—the recognized custom of merchants—or from some statute of the realm.[5] And a negotiable instrument may be made payable to order of a named person, or to the bearer.[6]

Negotiable instrument defined.

"A negotiable instrument payable to bearer is one which, by the custom of trade, passes from hand to hand by delivery, *and* the holder of which for the time being, if he is a *bonâ fide* holder for value without notice, has a good title notwithstanding any defect of title in the person from whom he took it. A contractual document, in other words, may be such that, by virtue of its delivery, all the rights of the transferor are transferred to and can be enforced by the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor."[7]

Test of negotiability.

Negotiable instruments therefore form an exception to the rule, "*Nemo dat quod non habet:*" and it is the capability of conferring on a *bonâ fide* holder for value a better title than that of his transferor which would appear to be the real test of negotiability.

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[1] Campbell on Sale, 2nd ed. p. 86; see per Lord Mansfield, in *Miller* v. *Race*, 1 Burr. 452; 1 Sm L. C. 447.

[2] Per Holroyd, J., *Wookey* v. *Pole*, 4 B. & Ald. 11; 22 R. R. 594.

[3] Per Holroyd, J., *Id.* p. 10.

[4] Per Bayley, J., *Id.* p. 15.

[5] Per Bowen, L.J., *Picker* v. *London Bank*, 18 Q. B. D. 519.

[6] See *post*, p. 169.

[7] *Simmons* v. *London Bank*, [1891] 1 Ch. 270, 294.

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They also possess the characteristic that the transferee can (and could before the Judicature Act) maintain an action at law upon them in his own name. These two characteristics are distinct,[1] and an instrument is not negotiable unless it possesses them both.

"It may be laid down as a safe rule that, where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a *negotiable* instrument, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable, or, though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title and the transfer be made out of market overt."[2]

Therefore (for example) though a bill of lading can be transferred so as to give the transferee a right to sue at law in his own name,[3] it is not "negotiable," because the transferee acquires no better title than his transferor had;[4] and the same is true of policies of assurance[5] and of other instruments made transferable at law by statute.[6]

Bonâ fide holder.

By a "*bonâ fide* holder" is meant a person who takes the instrument for value and honestly without notice or knowledge of any defect in the title of the transferor;[7] and "notice or knowledge" means "not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes—a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded."[8] It was formerly held that mere negligence or want of due caution in a party taking a negotiable instrument would fix him with the defective title of the party passing it to him,[9] but this doctrine is now exploded, and it is settled law that even gross negligence is not a sufficient defence

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[1] *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 381.

[2] Note to *Miller* v. *Race*, in 1 Sm. L. C. 456, cited per Blackburn, J., in *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 381; per Manisty, J., *London and County Bank* v. *London and River Plate Bank*, 20 Q. B. D. 239.

[3] 18 & 19 Vict. c. 111. *Ante*, p. 68.

[4] *Gurney* v. *Behrend*, 3 E. & B. 622; see notes to *Lickbarrow* v. *Mason*, 1 Sm. L. C. 674.

[5] 30 & 31 Vict. c. 144; *British Equitable Insur.* v. *G. W. Ry. Co.*, 38 L. J. Ch. 132.

[6] See *ante*, p. 132.

[7] See *post*, p. 185.

[8] Per Willes, J., *Raphael* v. *Bank of England*, 17 C. B. 161, 174.

[9] *Gill* v. *Cubitt*, 3 B. & C. 466.

where the plaintiff has given consideration, though it may be evidence of dishonesty or *mala fides*.[1] Wilful and fraudulent abstention from inquiry, if it arise from a suspicion or belief that inquiry would disclose a defect of title, may amount to notice;[2] but it is not enough for a plaintiff to show that there was carelessness, negligence, or foolishness, in not suspecting the defect of title.[3]

By custom.

In order to be negotiable by custom, an instrument must be accustomably transferable in this country, like cash, by delivery.[4]

Modern usage.

In the case of English instrments, it has been held that they cannot become negotiable by custom and usage except by the ancient law merchant, and that *modern* usage cannot make an instrument negotiable.[5] The authority of this case, however, has been much shaken.[6]

Foreign instruments.

With regard to foreign instruments, it must be shown that they are, by the custom of merchants, negotiable in this country;[7] it is not sufficient to show that they are negotiable in the foreign country.[8] Probably they must be negotiable in the foreign country also, but this can be inferred from the fact that they are negotiable in this country.[8]

Instruments on their face not negotiable.

If it appears upon the face of an instrument that the right to recover thereon is limited to one particular individual, or that it is not to be transferable by delivery, usage or custom cannot make it negotiable.[9]

Negotiability by estoppel.

A debtor may contract in such a way as to prevent himself from setting up equities against the holder of an instrument. Under the doctrine of "negotiability by estoppel," it has been held that the true owner may, by his own conduct and having regard to

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[1] *Goodman* v. *Harvey*, 4 A. & E. 870; *Raphael* v. *Bank of England*, 17 C. B. 161. See per Byles, J., *Swan* v. *North British Australasian Co.*, 2 H. & C. 184; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201.

[2] *Jones* v. *Gordon*, 2 App. Cas. 616, 625.

[3] *Id.* 628, per Lord Blackburn. See *Tatam* v. *Haslar*, 23 Q. B. D. 345; and the notes to *Miller* v. *Race* in 1 Sm. L. C. 468, where the cases are discussed.

[4] *Crouch* v. *Crédit Foncier*, *sup.*

[5] *Id.*

[6] *Goodwin* v. *Robarts*, L. R. 10 Ex. 355; 1 App. Cas. 476; *Rumball* v. *Metrop. Bank*, 2 Q. B. D. 194.

[7] *Gorgier* v. *Mieville*, 3 B. & C. 45; 27 R. R. 290; *A.-G.* v. *Bouwens*, 4 M. & W. 171; *Goodwin* v. *Robarts*, *sup.*; *Crouch* v. *Crédit Foncier*, *sup.*; *Venables* v. *Baring*, [1892] 3 Ch. 527.

[8] *Picker* v. *London Bank*, 18 Q. B. Div. 515.

[9] *Glyn* v. *Baker*, 13 East, 509; 12 R. R. 414; *Partridge* v. *Bank of England*, 9 Q. B. 396, 425; *London and County Bank* v. *London &c. Bank*, 20 Q. B. D. 232; 21 *Id.* 535; *Colonial Bank* v. *Cady*, 15 App. Cas. 267. As to bills, cheques and notes, see s. 8 of Bills of Exchange Act, 1882.

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the nature of the instrument in question, be precluded from asserting his title as against a *bonâ fide* holder for value. Thus where the plaintiff, the owner of a document containing a representation that the bearer of it would be entitled to receive a bond, left the document in the hands of his broker, who fraudulently deposited it with the defendants, it was held that the plaintiff could not recover, on the ground that the document was a representation to any one taking it—a representation which the plaintiff must be taken to have made, or to have been a party to—that, if it were taken in good faith and for value, the person taking it would stand to all intents and purposes in the place of the previous holder; and the plaintiff had put it in the power of his agent to hand over the document with this representation to those who were induced to alter their position on the faith of the representation so made.[1] But this doctrine depends on an estoppel raised against the true owner by his own conduct, and the effect is to make the instrument *quasi* negotiable *as against him*, but not to make it negotiable in the strict sense. If (for example), without any default on the part of the owner of such an instrument, it were stolen from him, no title could, it is apprehended, be made through the thief.[2]

Bills of Exchange.

Bills of exchange are negotiable.

The law as to bills of exchange, promissory notes, and cheques, is contained in the Bills of Exchange Act, 1882,[3] which embodies the pre-existing law with but slight modifications.[4] Prior to the passing of the Act, bills of exchange were negotiable by the law merchant;[5] promissory notes by statute;[6] cheques on bankers, which are bills of exchange payable on demand,[7] by the law merchant.

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[1] *Goodwin* v. *Robarts*, 1 App. Cas. 476. See *Rumball* v. *Metrop. Bank*, 2 Q. B. D. 194; *France* v. *Clark*, 26 Ch. D. 257; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120.

[2] See *Colonial Bank* v. *Cady*, 38 Ch. D. 388; 15 App. Cas. 267; *Colonial Bank* v. *Hepworth*, 36 Ch. D. 36; *Baxendale* v. *Bennett*, 3 Q. B. D. 525; *Scholfield* v. *Londesborough*. [1896] A. C. 514.

[3] 45 & 46 Vict. c. 61.

[4] As to the origin and history of bills of exchange and other negotiable instruments, see per Cockburn, C.J., *Goodwin* v. *Robarts*, L. R. 10 Ex. 346. As to the modifications introduced by the Act of 1882, see Chalmers on Bills of Exchange, 2.

[5] *Goodwin* v. *Robarts*, *sup.*

[6] *Post*, p. 194.

[7] *Grant* v. *Vaughan*, 3 Burr. 1516. See 45 & 46 Vict. c. 61, s. 73.

It must, however, be remembered that a negotiable instrument is a *chose in action*, and that therefore it can be transferred (formerly in equity only) under the general law.[1] The question therefore arises—What is the effect of a transfer for value of a bill of exchange made in the manner generally adopted for the transfer of choses in action, *i.e.*, by assignment to A. (without delivery of the bill) by a separate instrument, of which assignment notice is given to the debtor, followed by a transfer for value made according to the law applicable to negotiable instruments to another transferee, B., who had no notice of the prior transfer? In such a case, if the transaction took place before the Judicature Act, 1873, the transfer to A. operated in equity only, and therefore the legal title of B. necessarily prevailed. If the transaction took place after the Act, so that the first transferee could obtain a legal title, still, if he neglected to obtain delivery and to keep possession of the instrument, and thus by his laches enabled the second transfer to be made, he would probably be postponed for this reason to the second transferee.[2]

Effect of assignment by separate instrument.

Before we proceed to discuss the law as to bills of exchange, it will be convenient to state the meaning of the terms employed.

A bill of exchange may be in the form following :—

Form of bill of exchange.

London, 1st April, 1891.

£10,000.

Two months after date pay to Mr. John Jones or order Ten Thousand Pounds for value received.

To Mr. Robert Robinson,
Merchant, Liverpool.

Benjamin Brown.

Benjamin Brown is called the drawer; Robert Robinson the drawee, and, if he "accepts," he is called the "acceptor"; John Jones the "payee," and, if he indorses, *i.e.*, writes his name on the back of the bill, he is called the "indorser"; while the person to whom it is delivered (after indorsement) is called the holder.

A bill, of itself, is not an assignment of funds in the hands of the drawee available for payment of it, and a drawee who does not duly accept is not liable on the bill.[3]

Funds in hands of drawee.

The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance.[4] The drawer of a bill,

Liabilities of acceptor,

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[1] *Re Barrington*, 2 Sch. & Lef. 112; 9 R. R. 61; *Richardson* v. *Richardson*, 3 Eq. 686.

[2] See Chalmers on Bills of Exchange, 129.

[3] S. 53. See *post*, p. 196.

[4] Bills of Exchange Act, 1882, s. 54 (1). *Smith* v. *Vertue*, 9 C. B. N. S. 224, per Erle, C.J.

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of drawer, by drawing it, engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or *any* indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be

of indorser, duly taken;[1] and the indorser, by indorsing, enters into the same engagement with the holder or a *subsequent* indorser.[2]

of transferor without indorsement. A holder of a bill payable to bearer who negotiates by delivery without indorsement is not liable on the instrument; but he warrants to his transferee for value that the bill is what it purports to be, that he has a right to transfer it, and that he is not then aware of any fact which renders it valueless.[3]

Relation of parties. But the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and reasonable inferences derived from these facts and circumstances are admitted to qualify, alter, or even invert the relative liabilities which the law merchant would otherwise assign to them.[4]

Persons signing bill. A person who signs the bill otherwise than as drawer or acceptor incurs no liability to the drawer or acceptor, but he incurs the liability of an indorser to a holder in due course.[5]

Various definitions have been given of bills of exchange.

Definition. Blackstone says:—[6]

"A bill of exchange is a security, originally invented among merchants in different countries, for the more easy remittance of money from one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, 1,000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1,000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money in paper credit, without danger of robbery or loss. This method

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[1] S. 55 (1). *Siggers* v. *Lewis*, 1 C. M. & R. 370; *Macarty* v. *Barrow*, 2 Str. 949; 3 Wils. 17; *Jones* v. *Broadhurst*, 9 C. B. 181, per Cresswell, J.

[2] S. 55 (2). *Suse* v. *Pompe*, 8 C. B. N. S. 538. As to dishonour, see *post*, p. 176.

[3] S. 58.

[4] Per Lord Watson, in *Macdonald* v. *Whitfield*, 8 App. Cas. 745.

[5] Bills of Exchange Act, 1882, s. 56. See *Steele* v. *M'Kinlay*, 5 App. Cas. 754.

[6] 2 Bl. 466.

is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices, in order more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. The invention of them was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England in 1290; and in 1236 the use of paper credit was introduced into the Mogul Empire in China."

Definition in Act.

The Act of 1882 contains the following definition of a bill of exchange:—

S. 3. "(1.) A bill of exchange is an unconditional[1] order in writing, addressed by one person to another, signed[2] by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer.

"(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

"(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section;[3] but an unqualified order to pay, coupled with an indication of a particular fund[4] out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the bill, is unconditional.

"(4.) A bill is not invalid by reason

(*a.*) That it is not dated;[5]

(*b.*) That it does not specify the value given, or that any value has been given therefor;[6]

(*c.*) That it does not specify the place where it is drawn or the place where it is payable."[7]

Inland and foreign bills.

Bills of exchange are either "inland" or "foreign." An inland bill is, or on the face of it purports to be,[8]—

(1.) Both drawn and payable in the British Islands, or

(2.) Drawn within the British Islands upon some person resident therein.

Any other bill is a foreign bill.

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[1] See *Little* v. *Slackford*, M. & M. 171; 31 R. R. 726; *Hamilton* v. *Spottiswoode*, 4 Ex. 200.

[2] See ss. 18 and 20.

[3] *Jenny* v. *Herle*, 2 Ld. Raym. 1361.

[4] *Re Boyse*, 33 Ch. D. 612.

[5] In certain cases the holder may insert the date: see ss. 12, 20.

[6] *Hatch* v. *Trayes*, 11 A. & E. 702. Even if the bill contains a statement that value was given, the immediate parties may give evidence that it was not; *Abbott* v. *Hendricks*, 1 M. & Gr. 791.

[7] If no place of payment is specified the place of payment must be ascertained according to the rules laid down by s. 45 (4).

[8] Act of 1882, s. 4.

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An inland bill is in the form before given;[1] a foreign bill is generally in the form following:—

Foreign bill.

London, 1st Feb., 1882.

For francs 1000.

At sixty days after sight of this first of exchange (second and third unpaid) pay to the order of Messrs. Ambler & Co. one thousand francs.

Value received.

Hare, Rollet & Co.

To Messrs. Faber, Paris.

If the bill had been drawn on a person in the British Isles, the amount would have been made payable in English money.

When payable.

A bill may be payable on demand, or at a fixed or determinable future time.[2] A bill is payable on demand which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed.[3] It is payable at a determinable future time if it is expressed to be payable at a fixed period after date or sight, or on or at a fixed period after the occurrence of a specified event which is certain to happen though the time of happening may be uncertain.[4] An instrument payable on a contingency is not a bill.[5]

"Usance."

Foreign bills are sometimes drawn payable at one or more "usances," where by "usance" is meant time for payment as fixed by custom, having regard to the places where the bill is drawn and where it is made payable.

Days of grace.

Unless a bill is payable on demand, and unless the bill itself otherwise provides, three days, called "days of grace," are added to the time fixed by the bill, and the bill is due and payable on the last day of grace.[6]

Date.

A bill is not invalid by reason only that it is ante-dated or post-dated,[7] or that it bears date on a Sunday,[8] or by its not bearing any date, in which case the holder may insert the date.[9]

Payee.

Unless the bill is made payable to bearer, the payee must be named or indicated therein with reasonable certainty;[10] and

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[1] *Ante*, p. 167.

[2] S. 3.

[3] S. 10.

[4] S. 11. See *Colehan* v. *Cooke*, Willes, 399; *Goss* v. *Nelson*, 1 Burr. 226. See s. 14 as to the computation of the time of payment.

[5] S. 11. See *Palmer* v. *Pratt*, 2 Bing. 185; 27 R. R. 583; *Carlos* v. *Fancourt*, 5 T. R. 486; 2 R. R. 647.

[6] S. 14.

[7] *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715.

[8] S. 13 (2).

[9] S. 12.

[10] Ss. 3, 7. See *Chamberlain* v. *Young*, [1893] 2 Q. B. 206.

formerly, unless the bill was made payable to bearer, there could not be an alternative payee, "A. or B.,"[1] nor could a bill be made payable to the officer for the time being of a company;[2] but now either of these things can be done.[3]

Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.[4]

Referee in case of need.

The drawer or any indorser may insert in a bill the name of "a referee in case of need," that is, a person to whom the holder may resort in case the bill is dishonoured by non-acceptance or non-payment.[5]

Consideration.

It will be remembered that in the case of a contract by deed, that is, under seal, or, as it is termed, a "specialty," consideration is presumed in law;[6] this is by reason of the solemnity and deliberation with which, on account of the ceremonies to be observed, it is supposed to be entered into. As a general rule a contract not under seal, or a "simple contract," creates no right of action unless it is made for valuable consideration.[7] A bill of exchange contains a simple contract for payment, but at common law consideration for the bill is presumed till the contrary appears.

By the Act of 1882, "every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value."[8] Valuable consideration is any consideration sufficient to support a simple contract, or an antecedent debt or liability.[9] Such debt or liability is sufficient whether the bill is payable on demand or at a future time.[10]

Acceptance.

The acceptance of a bill is the signification by the drawee[11] of his assent to the order of the drawer.[12] It must be written on the bill, and be signed by the drawee.[13] The mere signature of the drawee without additional words is sufficient.[14] It must not express

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[1] *Blanckenhagen* v. *Blundell*, 2 B. & Ald. 417.

[2] *Storm* v. *Stirling*, 3 E. & B. 832.

[3] S. 7 (2).

[4] S. 7 (3); *Bank of England* v. *Vagliano*, [1891] A. C. 107; *Clutton* v. *Attenborough*, [1897] A. C. 90.

[5] S. 15.

[6] 2 Bl. 446.

[7] Plowd. 308. *Kekewich* v. *Manning*, 1 De G. M. & G. 176.

[8] S. 30 (1).

[9] S. 27 (1). See *Poirier* v. *Morris*, 2 E. & B. 89; *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715.

[10] S. 27 (1). See *Currie* v. *Misa*, L. R. 10 Ex. 153; 1 App. Cas. 554.

[11] *Ante*, p. 167; see *Davis* v. *Clark*, 6 Q. B. 16. As to acceptance for honour, see *post*, p. 183.

[12] Bills of Exchange Act, 1882, s. 17 (1).

[13] S. 17 (2a).

[14] *Ib.* Formerly, this was not sufficient; see *Hindhaugh* v. *Blakey*, 3 C. P. D. 136; *Steele* v. *M'Kinlay*, 5 App. Cas. 754; 41 & 42 Vict. c. 13, repealed by the Act of 1882.

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that the drawee will perform his promise by any other means than the payment of the money.[1]

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or has been dishonoured for non-acceptance or non-payment.[2]

"General" or "qualified."

An acceptance may be either "general" or "qualified." A general acceptance assents without qualification to the order of the drawer.[3] A qualified acceptance in *express* terms varies the effect of the bill as drawn.[4]

Qualified.

An acceptance is qualified which is—

(i) Conditional, that is, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;[5]

(ii) Partial, that is, to pay part only of the amount for which the bill is drawn;[6]

(iii) Local, that is, to pay *only* at a particular specified place;[7]

(iv) Qualified as to time;[8]

(v) The acceptance of some drawees, but not of all.[9]

Delivery.

To give effect to acceptance the bill must be delivered, that is, the possession, actual or constructive, of it must be transferred from one person to another,[10] and until delivery every contract in it, whether the drawer's, the acceptor's, or an indorser's, is incomplete and revocable; or there must be notification, that is, notice by the drawee to, or according to the directions of, the person entitled to the bill that he has accepted it, and then the acceptance is complete and irrevocable.[11]

Issue.

"Delivery" means transfer of possession, actual or constructive, from one person to another.[12] "Issue" means the first delivery of a bill complete in form to a person who takes it as holder.[12] It is immaterial that the "issue" has been induced by fraud.[13]

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[1] S. 17 (2b). See *Russell* v. *Phillips*, 14 Q. B. 891.

[2] S. 18.

[3] S. 19.

[4] S. 19 (2). *Meyer* v. *Decroix*, [1891] A. C. 520.

[5] *Ib.* See *Smith* v. *Vertue*, 9 C. B. N. S. 214.

[6] *Ib.* See *Petit* v. *Benson*, Comb. 452.

[7] *Ib.* See *Halstead* v. *Skelton*, 5 Q. B. 86.

[8] *Ib.* See *Russell* v. *Phillips*, 14 Q. B. 891.

[9] *Ib.*

[10] Act of 1882, ss. 2, 21.

[11] *Ib.* ss. 2, 21.

[12] *Ib.* As to delivery by post, see *Ex parte Cote*, 9 Ch. 27; *Smith* v. *Mundy*, 3 E. & E. 22.

[13] *Clutton* v. *Attenborough*, [1897] A. C. 90. As to issue on delivery by a thief, see *Baxendale* v. *Bennett*, 3 Q. B. D. 531; *Ingham* v. *Primrose*, 7 C. B. N. S. 82; *Arnold* v. *Cheque Bank*, 1 C. P. D. 578.

Skeleton bill—inchoate instruments.

The signing and delivery of a blank or skeleton bill is a *primâ facie* authority to fill it up for any amount which the stamp will cover,[1] using the signature for that of the drawer, the acceptor, or an indorser;[1] and similarly, when a bill is wanting in any material particular, the holder has *primâ facie* authority to fill up the omission in any way he thinks fit.[1] But the completion must be within a reasonable time and in accordance with the authority given;[2] though in the hands of a holder in due course, the bill is valid whether it had been so duly completed or not.[3] The drawer's name, it would seem, may be filled in even after the acceptor's death.[4]

Capacity of parties.

Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.[5] A corporation cannot make itself liable as a party to a bill unless it is competent so to do under the law relating to corporations.[5] If a bill is drawn or indorsed by a corporation having no power to incur liability on a bill, the holder is entitled to receive payment and to enforce the bill against any other party.[6]

Corporations.

In general a corporation can only contract by writing under its common seal,[7] and being established for a specific purpose cannot bind itself by a contract which is entirely unconnected with the purposes of its incorporation.[8] Therefore, it was held that a railway company, incorporated in the usual way by private Act of Parliament, which contained no provision empowering it to draw, accept, or indorse bills of exchange, was not competent to do so, and acceptances given by it with the seal of the company annexed were not binding upon it.[9] But a corporation may issue bills, where the terms of the instrument under which it is constituted authorize, upon a fair construction, the issuing of bills, or where the business of the corporation is one which cannot in its ordinary course be carried on without bills,[10] for instance, where it is incorporated for the purpose of trade.[11] In the case of a company under the Companies Act, 1862, the pro-

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[1] Act of 1882, s. 20 (1).

[2] S. 20 (2).

[3] *Ib.*

[4] *Carter* v. *White*, 25 Ch. D. 666.

[5] Act of 1882, s. 22 (1).

[6] S. 22 (2). *Smith* v. *Johnson*, 3 H. & N. 222.

[7] See *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374.

[8] *Bateman* v. *Mid Wales Rail. Co.*, L. R. 1 C. P. 508, per Erle, C.J.

[9] *Ib.* p. 499.

[10] *Peruvian Co.* v. *Thames, &c. Co.*, 2 Ch. 622.

[11] Byles on Bills, 77.

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visions of which are not affected by the Bills of Exchange Act,[1] the question will turn upon the proper construction of the memorandum and articles of association.[2]

A corporation generally signs a bill by procuration,[3] but, in place of signature to any instrument in writing required by the Act to be signed, the corporate seal may be attached; this does not mean that the bill or note of a corporation must be under seal.[4] By the Companies Act, 1862,[5] with regard to a company incorporated thereunder, and having authority to draw, accept, or indorse a bill of exchange, it is provided that:—

Companies Act, 1862.

> "A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf or on account of the company by any person acting under the authority of the company."

Where directors accepted bills on behalf of a company which had no power to accept bills, it was held that they were personally liable to an indorsee for value.[6]

Signature.

Signature is essential to liability under a bill whether as drawer, indorser, or acceptor.[7] Where a signature is forged or placed on a bill without authority, it is wholly inoperative, unless the party against whom it is sought to retain or enforce payment of the bill is estopped from setting up the forgery or want of authority.[8]

Forged or unauthorized signature.

For instance, where a person sued upon a bill has declared or admitted that the signature is his own, and has thereby altered the position of the holder to whom the declaration or admission has been made, he is estopped from denying his signature.[9] Where a forged bill has been paid, and the position of the holder has been altered, the payer cannot recover back the money which he has paid when he subsequently discovers the forgery.[9] It has been

Estoppel.

Ratification.

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[1] S. 97 (3) (*b*).

[2] Companies Act, 1862 (25 & 26 Vict. c. 89), s. 47.

[3] See *post*, p. 175.

[4] Act of 1882, s. 91 (2). Before the Act it was doubtful whether a bill or note issued under the seal of a corporation was negotiable: *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 382, 383.

[5] 25 & 26 Vict. c. 89, s. 47; and see 30 & 31 Vict. c. 131, s. 37.

[6] *West London Bank* v. *Kitson*, 13 Q. B. D. 360.

[7] Act of 1882, s. 23.

[8] S. 24. Subject to some exceptions contained in ss. 54, 55, 60, 80, and 82. See *Bank of England* v. *Vagliano*, [1891] A. C. 107.

[9] *London and River Plate Bank* v. *Liverpool Bank*, [1896] 1 Q. B. 7.

held that there cannot be ratification of an unauthorized signature amounting to a forgery.[1]

Banker's liability.

Where a drawee accepts a bill "payable at" a banker's, the banker, if he pay on a forged indorsement, cannot charge his customer with the amount so paid.[2]

But where the banker is himself the drawee, he is protected when the bill is payable to order on demand, and he pays it in good faith and in the ordinary course of business; he need not show that the indorsement of the payee, or any subsequent indorsement, was by or under the authority of the person whose indorsement it purports to be; and he is deemed to have paid the bill in due course, although the indorsement have been forged or made without authority.[3]

Signature by agent.

Signature in the name of the person to be made liable may be made by an agent.[4] Upon the principle already discussed,[5] an agent managing a business, part of which consists in drawing, indorsing, or accepting bills, may bind his principal by signing his name to a bill though he be specially instructed not to do so;[6] and an agent having authority to sign the name of his principal may direct another person to sign that name to a particular bill.[7]

Sometimes the signature is "by procuration," thus, "Benjamin Brown, *per pro.* Samuel Smith." Such a signature operates as notice that Samuel Smith, as the agent of Benjamin Brown, has but a limited authority to sign; and the principal is bound only if the agent was acting within the limits of his authority.[8] If a person signs as agent, knowing that he has no authority, he is liable for the false representation.[9]

When a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he does not become personally liable;[10] but the mere addition of words de-

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[1] *Brook* v. *Hook*, L. R. 6 Ex. 89, per Kelly, C.B. But see *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82.

[2] *Robarts* v. *Tucker*, 16 Q. B. 560; Byles on Bills, 254, 296.

[3] Act of 1882, s. 60 (taken from 16 & 17 Vict. c. 59, s. 19). See *Halifax* v. *Wheelwright*, L. R. 10 Ex. 191; *Lacave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148.

[4] S. 91.

[5] *Ante*, p. 71.

[6] *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.

[7] *Lord* v. *Hall*, 8 C. B. 627.

[8] Act of 1882, s. 25.

[9] *Polhill* v. *Walter*, 3 B. & Ad. 114; 37 R. R. 344; *West London Bank* v. *Kitson*, 13 Q. B. D. 360.

[10] S. 26 (1). See *Re Barnard*, 32 Ch. D. 447.

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scribing him as an agent, or as filling a representative character, does not exempt him from personal liability.[1]

The usual term to employ in an indorsement by an agent is "*sans recours*," or "without recourse" ("to me" being understood), or "*sans frais*."

In determining whether the signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument must be adopted.[2]

Presentment.

The term presentment is used in two meanings. Sometimes it means presentment to the drawee for acceptance, and sometimes presentment for payment when the bill comes to maturity.

Dishonour and protest.

A bill is said to be "dishonoured" if either acceptance or payment is refused. If an inland bill is dishonoured, a minute may be made on it at the request of the holder by a notary public, referring to the notary's register. If a foreign bill is dishonoured it may be "protested" before a notary public.

Presentment for acceptance.

In order to render a party to a bill liable, presentment by the holder of a bill to the drawee for acceptance is necessary in the following cases only, namely: (1.) Where it is payable after sight, in which case it is necessary in order to fix the maturity of the instrument; or (2.) Where it expressly stipulates that it shall be presented; or (3.) Where it is drawn payable elsewhere than at the residence or place of business of the drawee.[3]

Where presentment is optional, the objects in presenting are to obtain the acceptance of the drawee, and thus to render him liable on the bill; and in case the drawee refuses to accept, or, as it is called, "dishonours" the bill, to have an immediate right to proceed against the drawer and prior indorsers.[4]

The holder of a bill payable after sight must either present it for acceptance or negotiate it within a reasonable time; otherwise the drawer and all indorsers prior to that holder will be discharged. In determining what is reasonable time, regard must be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.[5]

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[1] S. 26 (1). See *Re Barnard, sup.*

[2] S. 26 (2).

[3] S. 39.

[4] S. 43.

[5] S. 40. As to what is reasonable time, see *Ramchurn Mullick* v. *Radakissen*, 9 Moo. P. C. 46; *Muilman* v. *D'Eguino*, 2 H. Bl. 565; *Mellish* v. *Rawdon*, 9 Bing. 416; *Straker* v. *Graham*, 4 M. & W. 721; *Fry* v. *Hill*, 7 Taunt. 397; 18 R. R. 512.

The following rules as to due presentment for acceptance are laid down by the Act:—[1]

(1.) The presentment must be made by or on behalf of the holder to the drawee, or to some person authorised to accept or refuse acceptance on his behalf,[2] at a reasonable hour on a business[3] day, and before the bill is overdue.

(2.) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only.

(3.) Where the drawee is dead, presentment may be made to his personal representative.

(4.) Where the drawee is bankrupt, presentment may be made to him or to his trustee.

(5.) Where authorised by agreement or usage, a presentment through the post-office is sufficient.

When excused.

Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance:—[4]

(1.) Where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill.

(2.) Where, after the exercise of reasonable diligence, such presentment cannot be effected.

(3.) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

Effect of non-acceptance.

Non-acceptance within the customary time[5] must be treated as dishonour, otherwise the holder loses his right of recourse against the drawer and indorsers.[6] A bill is dishonoured if it is not accepted on presentment, or if it is not accepted when presentment is excused.[7] The effect of such dishonour is that an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.[8]

A qualified acceptance may be refused by the holder and treated as dishonour; but where taken without the authority or assent of the drawer or an indorser, it not being a partial acceptance whereof due notice has been given, such drawer or indorser is discharged from liability, unless he has had notice of the qualified

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[1] S. 41 (1).

[2] Putting the bill into a bill-box in the usual manner is sufficient.

[3] Business days are defined in s. 92.

[4] S. 41 (2).

[5] The custom is to leave the bill with the drawee, if so required, for 24 hours, at the end of which time he must give it back, accepted or not accepted. See *Bank of Van Diemen's Land* v. *Bank of Victoria*, L. R. 3 P. C. 526.

[6] S. 42.

[7] S. 43 (1).

[8] S. 43 (2).

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acceptance and has not signified his dissent within a reasonable time.[1]

Presentment for payment.

Every bill must be duly presented for payment, or the drawer and indorsers will be discharged,[2] except in the following cases:—[3]

(1.) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected; but the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.[4]

(2.) Where the drawee is a fictitious person.[5]

(3.) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(4.) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(5.) By waiver of presentment, express or implied.[6]

No particular form of presentment is necessary.[7]

A bill is duly presented for payment if presented in accordance with the following rules:—[8]

(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due.[9]

(2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable. In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3.) Presentment for payment must be made by the holder, or by some person authorised to receive payment on his behalf, at a reasonable hour on a business day, at the proper place as hereinafter defined,[10] either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found.[11]

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[1] S. 44.

[2] S. 45.

[3] S. 46.

[4] Even if the acceptor tells the holder that he will not pay it when due; *Baker* v. *Birch*, 3 Camp. 107; 13 R. R. 767; or becomes bankrupt before maturity; *Bowes* v. *Howe*, 5 Taunt. 30; 14 R. R. 700.

[5] See *Bank of England* v. *Vagliano*, [1891] A. C. 107; *Clutton* v. *Attenborough*, [1897] A. C. 90.

[6] *Hopley* v. *Dufresne*, 15 East, 275; 13 R. R. 463.

[7] Per Cairns, C., *Re East of England Bank*, 4 Ch. 18.

[8] Act of 1882, s. 45.

[9] See *ante*, p. 170.

[10] S. 45 (4), (5).

[11] The person presenting the bill must show it, and give it up on being paid. S. 52 (4).

(4.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(5.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(6.) Where authorized by agreement or usage, a presentment through the post office is sufficient.

Delay in presentment.

Delay in presentment is excused when caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence;[1] but it must be made with reasonable diligence when the cause of delay ceases to operate.[2]

Dishonour

Effect of.

A bill is dishonoured by non-payment when on due presentment it is not paid, or when presentment is excused and the bill is overdue and unpaid.[3] The effect of such dishonour is that an immediate right of recourse against the drawer and indorsers accrues to the holder;[3] but he cannot sue any party until after the last day for payment.[4]

Notice of dishonour.

Notice of dishonour, whether by non-acceptance or by non-payment, must, except in the cases mentioned below, be given to the drawer and each indorser, and any to whom notice is not given will be discharged;[5] but if notice of dishonour for non-acceptance is not given, a holder in due course subsequent to such omission is not prejudiced;[6] and when notice of dishonour for non-acceptance is given, notice of dishonour for nonpayment is unnecessary, unless in the meantime the bill has been accepted.[5]

Excuses for non-notice and delay.

Delay in giving notice of dishonour is excused on the same grounds as delay in presentment.[7] Notice of dishonour is dispensed with in the following cases,[7]—

(1.) When, after the exercise of reasonable diligence, notice as required by this Act cannnot be given to or does not reach the drawer or indorser sought to be charged:

(2.) By waiver,[8] express or implied, notice of dishonour may

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[1] S. 46 (1). See *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525.

[2] S. 46 (1).

[3] S. 47.

[4] *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759.

[5] S. 48.

[6] *Dunn* v. *O'Keeffe*, 5 M. & S. 282; 17 R. R. 326.

[7] S. 50. See s. 46 (1), *ante*. Notice must be given, even if the acceptor is a bankrupt; *Esdaile* v. *Sowerby*, 11 East, 114; 10 R. R. 440.

[8] As to what amounts to waiver, see *Phipson* v. *Kneller*, 4 Camp. 285; *Brett* v. *Levett*, 13 East, 213; *Cordery* v. *Colvin*, 14 C. B. N. S. 374; *Woods* v. *Dean*, 3 B. & S. 101.

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be waived before the time of giving notice has arrived, or after the omission to give due notice:

(3.) As regards the drawer in the following cases, namely—(1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract,[1] (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill,[2] (5) where the drawer has countermanded payment:

(4.) As regards the indorser in the following cases, namely—(1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

Rules for giving notice.

Notice of dishonour must be given in accordance with the rules expressed in the Act,[3] some of the most important of which are—

(1.) It may be given in writing or by personal communication, and in any sufficient terms. It may be partly written and partly verbal. If written, it need not be signed. If duly addressed and posted it is sufficient notwithstanding any miscarriage by the post office.

(2.) It may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.[4]

(3.) In the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless—where the person giving, and the person to receive notice, reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill:[5] or where they reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter.[6]

(4.) Where a bill when dishonoured is in the hands of an agent he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.[7]

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[1] *Leach* v. *Hewitt*, 4 Taunt. 731; 14 R. R. 652.

[2] *Bickerdike* v. *Bollman*, 1 T. R. 405; 2 Sm. L. C. 99; 1 R. R. 242; *Sharp* v. *Bailey*, 9 B. & C. 44. This is the case of the bill having been accepted for the accommodation of drawer.

[3] S. 49.

[4] *Hine* v. *Allely*, 4 B. & Ad. 624; *Darbishire* v. *Parker*, 6 East, 2.

[5] *Smith* v. *Mullett*, 2 Camp. 208; 11 R. R. 694.

[6] *Williams* v. *Smith*, 2 B. & Ald. 496; 21 R. R. 373; *Hawkes* v. *Salter*, 4 Bing. 715; 29 R. R. 708; *Fielding* v. *Corry*, [1898] 1 Q. B. 268.

[7] *Bray* v. *Hadwen*, 5 M. & S. 68; 17 R. R. 277; *Clode* v. *Bayley*, 12 M. & W. 51.

(5.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.[1]

Protest or noting of bill.

A "protest" is a solemn declaration made by a notary public;[2] it must contain a copy of the bill, and must be signed by the notary, and must specify the person at whose request it is made, the place and date, and the cause and reason of protest.[3] Where the bill is lost or destroyed, or wrongfully detained, the protest may be on a copy or written particulars thereof.[4] Where a notary cannot be obtained, it may be protested by a householder, or substantial resident of the place where the bill is dishonoured, in the presence of two witnesses, in the form prescribed by the Act.[5]

"Noting."

"Noting" is a minute made on the bill by the officer at the time of refusal of acceptance or payment, and is considered as the preparatory step to protest.[6] Where a bill is required to be protested within a specified time, or before some further proceeding is taken, it is sufficient that the bill has been noted for protest within such time or before such proceeding, and the formal protest may be extended at any time as of the date of the noting.[7]

An inland bill may be noted or protested for non-acceptance or non-payment; but need not be so to preserve recourse against the drawer or indorser.[8] The only use of protesting an inland bill is to enable it to be accepted for honour.[9] On the other hand, a foreign bill, appearing on the face of it to be such, must be duly protested.[10] And where the acceptor of a bill becomes bankrupt, or suspends payment before it matures, the holder may have the bill protested for better security against the drawer and indorsers.[11]

Protest is dispensed with by any circumstance which would dispense with notice of dishonour, and delay in noting or protesting

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[1] See, generally, as to notice of dishonour, *Bickerdike* v. *Bollman*, 2 Sm. L. C. 99, and notes thereto.

[2] Byles on Bills, 212, 214.

[3] Act of 1882, s. 51 (7).

[4] S. 51 (8).

[5] S. 94, and Sched. I.

[6] Byles on Bills, 214; *Leftley* v. *Mills*, 4 T. R. 170; 2 R. R. 350.

[7] S. 93.

[8] S. 51 (1).

[9] Ss. 65—68.

[10] S. 51 (1), (2). Various reasons are given for this difference: see Byles on Bills, 211.

[11] S. 51 (5). See *Ex p. Bank of Brazil*, [1893] 2 Ch. 438.

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may be excused by circumstances beyond the control of the holder.[1]

Presentment unnecessary as against acceptor.

When a bill is accepted generally, presentment for payment is not necessary to make the acceptor liable.[2] If presentment is required by the terms of a qualified acceptance unless there is an express stipulation to that effect the acceptor is not discharged by omission to present on the day the bill matures,[2] nor, as against him, is protest or notice of dishonour necessary.[2]

Damages on dishonour of bill.

Where a bill is dishonoured, the holder may recover from any party liable on the bill—the drawer, who has been compelled to pay, from the acceptor, and an indorser, who has been compelled to pay, from the acceptor, or from the drawer, or from a prior indorser—the following liquidated damages :—[3]

(*a.*) The amount of the bill.

(*b.*) Interest from presentment for payment, if the bill is payable on demand, otherwise from maturity.[4]

(*c.*) The expenses of noting or, when protest is necessary[5] and the protest has been extended, of protest.

Re-exchange.

Where the bill has been dishonoured abroad, in lieu of the above the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay may recover from any party liable to him, the amount of the re-exchange[6] with interest thereon until payment.[7]

Where a bill is payable abroad, the holder has a right to be paid a certain sum in foreign currency in a foreign country ; in other words, he is entitled, if the bill is dishonoured, as against any one liable in this country on the bill, to such a sum of English money as would purchase that amount of foreign money together with the costs of transmitting it to England, as well as the costs of protest, &c.[8] The easiest manner for the holder to obtain English money from the person in England liable to pay, is by drawing a bill at sight for the amount on him.[8] The word "re-exchange" is used in this section for the amount for which the bill at sight would have to be drawn. The word is also used in the meanings

[1] S. 51 (9) ; and see ss. 46, 50, *ante*, p. 179 ; *Campbell* v. *Webster*, 2 C. B. 258 ; *Legge* v. *Thorpe*, 12 East, 171.

[2] S. 52. See *ante*, p. 178.

[3] S. 57 (1). Therefore the claim may be made under R. S. C., Order III. r. 6 ; see *Dando* v. *Boden*, [1893] 1 Q. B. 318.

[4] *Re East of England Bank*, 4 Ch. 14.

[5] *Exp. Bank of Brazil*, *sup.*

[6] As to "re-exchange," see *Willans* v. *Ayers*, 3 App. Cas. 133.

[7] S. 57 (2). See s. 97 (2) ; and *Re Gillespie*, 18 Q. B. D. 286 ; *Re Commercial Bank of S. Australia*, 36 Ch. D. 522.

[8] *Suse* v. *Pompe*, 8 C. B. N. S. 538, 563.

of (1) the loss on a particular transaction owing to the exchange being adverse,[1] and (2) the course of exchange itself.

Interest.

Where, by the Act, interest may be recovered as liquidated damages, it may, if justice require it, be withheld wholly or in part; and, where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.[2] "Interest proper" is where a bill is expressed to be payable with interest; which, unless the instrument otherwise provides, runs from the date of the bill, and, if the bill is undated, from its issue.[3]

Acceptance for honour.

Where a bill has been protested for non-acceptance or for better security and is not overdue, any person not already liable on it may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable on it, or of the person for whose account it is drawn;[4] where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.[5]

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[1] *The phrases "course of exchange" and exchange being "adverse" require some explanation. If A. in London owes French money to B. in Paris, he must, if he pays in cash, send English money to Paris and therewith purchase French money with which to pay his debt. The transmission of bullion is always a costly process, owing to its weight and its liability to be stolen. The employment of bills of exchange reduces the amount of gold that has to be transmitted to a minimum. It will be obvious that if C. in Paris owed to D. in London an amount of English money equal in value to the French money due to B., both debts could be satisfied without transmitting bullion between London and Paris, by an arrangement that C. instead of A. should pay B., and that A. instead of C. should pay D. In practice A. buys in London a bill payable in Paris and transmits it to B. If the total amount of debts payable in Paris by persons in London equals the amount payable in London by persons in Paris, the price of a bill merely depends upon the relative value of sovereigns and francs, and the "rate of exchange," sometimes called the "course of exchange," is said to be at "par." But if more debts are payable in Paris by persons in London than are payable in London by persons in Paris, there will be a competition in London for bills payable in Paris, and the price will rise until it becomes cheaper to transmit bullion than to purchase bills. In this case the rate of exchange is the price given in London calculated in sovereigns for a bill payable in francs in Paris, and the exchange is said to be "adverse" to London.

* Course of exchange.

[2] S. 57 (3); *Cameron* v. *Smith*, 2 B. & Ald. 308; 20 R. R. 444; *Ward* v. *Morrison*, Car. & M. 368.

[3] S. 9 (3); *Doman* v. *Dibden*, R. & M. 381; 37 R. R. 761; *Roffey* v. *Greenwell*, 10 A. & E. 222.

[4] S. 65. The form of the acceptance may be "Accepted S.P.," but it usually states for whose honour it is accepted. The practice is for an acceptance for honour to be attested by a notarial "act of honour" recording the transaction, but perhaps this is not necessary.

[5] S. 65 (5).

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The acceptor for honour is liable, on due presentment, to pay according to his acceptance, if the bill is not paid by the drawee, if it has been duly presented and protested for non-payment, and he has notice thereof.[1] He is liable to the holder and all parties subsequent to the party for whose honour he has accepted.[1]

A dishonoured bill accepted for honour *supra* protest, or containing a reference in case of need,[2] must be protested for non-payment before it is presented for payment to the acceptor for honour or referee in case of need; delay in presentment, or non-presentment, is excused by any circumstance which would excuse delay in presentment, or non-presentment, for payment.[3]

Payment for honour.

Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable on it, or of the person for whose account it is drawn;[4] but payment for honour, to operate as such and not as a mere voluntary payment, must be attested by a notarial act.[5]

Payment for honour discharges all parties subsequent to the party for whose honour it is made;[6] the payer succeeds to all the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party,[6] and is entitled to have the bill and protest.[7]

If the holder refuse to receive payment *supra* protest, he will lose his right of recourse against any party who would have been discharged by such payment.[8]

Accommodation.

Sometimes a person wishing to issue a bill will ask another to lend him his acceptance, the intention being that the latter should accept the bill, and take it up at maturity, but the former should provide the funds for so doing or indemnify the acceptor.[9] Such a bill is called an "accommodation bill." In a case of this nature the acceptor, who according to the terms of the bill is the principal debtor, is really merely a surety. It follows that, if he pays the bill, he has the rights of a surety, *e.g.*, he is entitled to the benefit of all the securities held by the creditor.[10]

The Act of 1882 defines an "accommodation party" as "a

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[1] S. 66.

[2] See s. 15, *ante*, p. 171.

[3] S. 67. *Ante*, p. 178.

[4] S. 68 (1), (2).

[5] S. 68 (3), (4); *Re Wyld*, 2 De G. F. & J. 642.

[6] S. 68 (5).

[7] S. 68 (6).

[8] S. 68 (7).

[9] *Reynolds* v. *Doyle*, 1 M. & Gr. 753; *Yates* v. *Hoppe*, 9 C. B. 541.

[10] *Bechervaise* v. *Lewis*, L. R. 7 C. P. 377. See *ante*, p. 159.

person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person;"[1] and provides that he is liable to a holder for value, whether the holder took the bill with knowledge of the facts or not.[1]

Where several persons are accommodating parties, their rights, *inter se*, are those of co-sureties, irrespective of the position of their names on the instrument.[2]

It will be observed that the accommodation party becomes liable as soon as value is given, and notice to the party giving value is immaterial.

Holder.

The "holder" means the payee or indorsee of a bill who is in possession of it, or the bearer thereof.[3]

Holder in due course.

The "holder of a bill in due course," which expression takes the place of "*bonâ fide* holder for value without notice," or "innocent indorsee," is thus defined:—[4]

> (1.) A holder in due course is a holder[5] who has taken a bill, complete and regular on the face of it, under the following conditions, namely,—
>
> (i) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:
>
> (ii) That he took the bill in good faith and for value,[6] and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.
>
> (2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.
>
> (3.) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Presumption of good faith.

Every holder is *primâ facie* deemed to be a holder in due course; but if in an action on the bill it is admitted or proved that the acceptance, issue, or negotiation is affected with fraud, duress, or

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[1] S. 28.

[2] *Reynolds* v. *Wheeler*, 10 C. B. N. S. 561; *Macdonald* v. *Whitfield*, 8 App. Cas. 733.

[3] Act of 1882, s. 2.

[4] S. 29.

[5] A person who is not a holder cannot be a holder in due course; *Whistler* v. *Forster*, 14 C. B. N. S. 248.

[6] As to "value," see *ante*, p. 171.

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force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has been given in good faith.[1]

Good faith.

A thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not.[2]

Negotiation.

A bill is "negotiated"[3] when it is so transferred from one person to another as to make the transferee the "holder."[4] A bill payable to bearer is negotiated by delivery,[5] and a bill payable to order, by indorsement[6] of the holder completed by delivery.[4] If the holder of a bill payable to order transfers for value without indorsement, the transferee acquires such title as the transferor had,[7] and also a right to have the indorsement of the transferor.[8]

Indorsement.

A person who is under an obligation to indorse a bill in a representative capacity may indorse it in such terms as to negative personal liability.[9]

The indorsement must be written on the bill itself, or sometimes on an "allonge," that is, a slip of paper attached to the bill, where there is not room on the bill for all the indorsements.[10]

Requisites of indorsement.

An indorsement must be of the whole bill. A partial indorsement, *i.e.*, one which purports to transfer part only of the amount payable, or to transfer to two or more indorsees severally, does not operate as a negotiation of the bill.[11]

Where in a bill payable to order the payee or indorsee is wrongly designated or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.[12] Where a bill is made payable to the order of a married woman thus, "To Mrs. John Jones or order," the generally accepted indorsement is (say), "Martha Jones, wife of John Jones."[13]

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[1] S. 30 (2). *Tatam* v. *Haslar*, 23 Q. B. D. 345.

[2] S. 90. See *ante*, p. 164.

[3] See *ante*, p. 163.

[4] S. 31. See *Day* v. *Longhurst*, 62 L. J. Ch. 334.

[5] "Delivery" means transfer of possession, actual or constructive, from one person to another: s. 2.

[6] That is, by signature of the holder on the bill: s. 32. See *Re Barrington*, 2 Sch. & L. 112; *Ex parte Yates*, 2 De G. & J. 191.

[7] *Whistler* v. *Forster*, 14 C. B. N. S. 248.

[8] S. 31 (4). See *Day* v. *Longhurst*, 62 L. J. Ch. 334. See s. 58, *ante*, p. 168.

[9] S. 31 (5). See ss. 16, 26, *ante*, p. 175.

[10] S. 32 (1).

[11] S. 32 (2).

[12] S. 32 (4).

[13] See Chalmers on Bills of Exchange, p. 109.

Indorsements are deemed to have been made in the order in which they appear on the bill until the contrary is proved.[1]

Conditional acceptance or indorsement.

Although the drawing of a bill must be unconditional, the acceptance may be conditional,[2] as, for instance, "payable on delivery of bills of lading:" so an indorsement is not void because it purports to be conditional, but the condition may be disregarded by the payer, and payment to the indorsee will be valid whether the condition have been fulfilled or not.[3]

Indorsement in blank, or special,

An indorsement "in blank" specifies no indorsee, and the bill is payable to bearer; a "special" indorsement specifies the person to whom, or to whose order, the bill is payable.[4]

restrictive.

The indorsement may be restrictive,[5] *i.e.*, it may prohibit the further negotiation of the bill, or may be expressed to be a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if the bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection." A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto whom his indorser could have sued; but it gives him no power to transfer his rights as indorsee unless it expressly authorizes him so to do.[6] In a case of this nature the indorsee is practically the agent for the indorser.[7]

Negotiation of overdue bill;

A negotiable bill continues to be such until it has been restrictively indorsed, or discharged by payment or otherwise.[8] An overdue bill, however, can only be negotiated subject to any defect of title affecting it at its maturity, and the transferee can only acquire or give such title as the person from whom he took it had.[9] A bill payable on demand is overdue when it appears on the face of it to have been in circulation for an unreasonable time;[10] what is an unreasonable time is a question of fact.[10] Every negotiation

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[1] S. 32 (5). See *Macdonald* v. *Whitfield*, 8 App. Cas. 733.

[2] S. 19 (2) (*a*); *ante*, p. 172.

[3] S. 33. This was not the law before the Act of 1882; see *Robertson* v. *Kensington*, 4 Taunt. 30.

[4] S. 34 (1), (2); s. 32 (6). See the distinction between these indorsements explained in *Harmer* v. *Steele*, 4 Ex. 1.

[5] S. 32 (6).

[6] S. 35. Examples of restrictive indorsements will be found in *Ancher* v. *Bank of England*, 2 Doug. 637; *Sigourney* v. *Lloyd*, 8 B. & C. 622; 5 Bing. 525; 32 R. R. 504

[7] *Williams* v. *Shadbolt*, C. & E. 529.

[8] S. 36 (1); *Callow* v. *Lawrence*, 3 M. & S. 95.

[9] S. 36 (2). See *Holmes* v. *Kidd*, 3 H. & N. 891; *Lloyd* v. *Howard*, 15 Q. B. 995.

[10] S. 36 (3). See *London, &c. Bank* v. *Groome*, 8 Q. B. D. 288. As to bills not payable on demand, see s. 14, *ante*, p. 170.

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is presumed to have been effected before the bill was overdue, unless the indorsement is dated after maturity.[1]

of dishonoured bill.

A person who takes a dishonoured bill, not overdue, with notice of the dishonour, takes it subject to any defect of title attaching at the time of dishonour; but the rights of a "holder in due course" are not affected.[2]

Rights and powers of holder.

The holder may sue on a bill in his own name.[3] If he is a holder in due course, he holds the bill free from any defect of title of prior parties, and may enforce payment against all parties liable on the bill.[4] Where his title is defective, if he negotiates to a holder in due course, that holder obtains a good and complete title, and if he obtains payment the payer is discharged.[5]

Stolen or forged bill.

It will be remembered that the Larceny Act, 1861,[6] providing for the revesting of stolen property on the conviction of the thief, does not apply to negotiable instruments; and that a forged signature is wholly inoperative.[7]

Discharge of bill;

A bill is discharged:—[8]

(1) by payment[9] in due course (that is, at or after maturity to the holder in good faith and without notice of defect in his title) by or on behalf of the drawee or acceptor:[10]

(2) if an accommodation bill, when paid in due course by the party accommodated:[11]

(3) when the acceptor is the holder at or after maturity in his own right:[12]

(4) when the holder at or after maturity unconditionally renounces his rights against the acceptor; but such

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[1] S. 36 (4). See *Lewis* v. *Parker*, 4 A. & E. 838; *Bounsall* v. *Harrison*, 1 M. & W. 611.

[2] S. 36 (5). See *Crossley* v. *Ham*, 13 East, 498; 12 R. R. 410.

[3] S. 38 (1). See *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 380.

[4] S. 38 (2).

[5] S. 38 (3).

[6] 24 & 25 Vict. c. 96, s. 100, *ante*, p. 42; see *Chichester* v. *Hill*, 52 L. J. Q. B. 160.

[7] *Ante*, p. 174.

[8] *I. e.*, all rights of action on the bill are extinguished. This has nothing to do with the question whether other rights of action arising out of the bill transaction still exist; *Harmer* v. *Steele*, 4 Ex. 1; and it must be distinguished from discharge of the parties; *O'Keeffe* v. *Dunn*, 6 Taunt. 315; 16 R. R. 623.

[9] "Payment" is not a technical word: per Maule, J., *Maillard* v. *Argyle*, 6 M. & Gr. 45. It may be made without money.

[10] Act of 1882, s. 59 (1). As to payment by drawer or indorser, see s. 59 (2).

[11] S. 59 (3).

[12] S. 61.

renunciation must be in writing, unless the bill is delivered up to the acceptor:[1]

(5) where it is intentionally and apparently[2] cancelled by the holder or his agent.[3]

by alteration.

Also, where a bill or acceptance is materially altered without the assent of all parties, the bill is discharged, except against the party who made, authorized, or assented to the alteration, and subsequent indorsers; provided that, where the alteration is not apparent, the holder in due course may avail himself of the bill as if it had not been altered, and may enforce payment according to its original tenor.[4] Where the alteration is such as to make a fresh stamp requisite, penalties may be incurred, and a person taking the bill may be prevented by the Stamp Acts from recovering upon it.[5]

A person who accepts a bill in such a form as to facilitate an alteration in the amount does not thereby become liable to pay the altered amount to a holder in due course.[6]

Bills in a set.

Foreign bills are often drawn in duplicate or in "a set," each part of the set being numbered and referring to the other parts; for instance:—

Calcutta, 1 Jan., 1887.

£5,000.

At three months after sight pay this first of exchange (second and third not paid) to the order of Mr. John Jones the sum of £5,000 sterling value in account.

B. Brown & Co.

To R. Robinson & Co.

The whole of the parts constitute one bill,[7] and therefore, when one part of the set is duly stamped, the others are exempt from duty, unless issued or negotiated separately from the stamped part.[8] Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every subsequent indorser is liable on the part he has himself indorsed, as if the

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[1] S. 62; *Harmer* v. *Steele*, 4 Ex. 1; *Re George*, 44 Ch. D. 627; *Edwards* v. *Walters*, [1896] 2 Ch. 157.

[2] *Leeds Bank* v. *Walker*, 11 Q. B. D. 84.

[3] S. 63.

[4] S. 64; but see as to supplying material omission, s. 20, *ante*, p. 173. For instances of material alterations, see s. 64 (2), and notes to *Master* v. *Miller*, 1 Sm. L. C. 780; and as to the proviso, see *Leeds Bank* v. *Walker*, 11 Q. B. D. 84; *Scholfield* v. *Londesborough*, [1894] 2 Q. B. 660.

[5] S. 97; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38.

[6] *Scholfield* v. *Londesborough*, [1896] A. C. 514.

[7] Act of 1882, s. 71.

[8] The Stamp Act, 1891, s. 39.

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parts were separate bills.[1] Where two or more parts are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true holder of the bill; but this does not affect the rights of a person who in due course accepts or pays the part first presented to him.[2] If the drawee accepts more than one part, and his acceptances get into the hands of different holders in due course, he will be liable on each part as on a separate bill.[3]

Lost bills.

If a bill is lost before it is overdue, the person who was the holder may compel the drawer to give him another bill of the same tenor upon receiving a full indemnity against all claims on the lost bill.[4] In any proceedings upon a bill, it may be ordered that the loss thereof shall not be set up, provided that a satisfactory indemnity be given.[5]

Conflict of laws.

"Sometimes," says Mr. Justice Byles,[6] "bills drawn in England are payable in a foreign country, and bills drawn in a foreign country are payable in England. Sometimes English bills circulate abroad, and foreign bills circulate here: and frequently suits on foreign bills, or bills negotiated abroad, are brought in English Courts of Justice. The laws of foreign countries, as to bills of exchange, often differ widely from the law of England, and from each other. But natural justice, mutual convenience, and the practice of all civilised nations, require that contracts, wherever enforced, should be regulated and interpreted according to the laws with reference to which they were made; otherwise the rights and liabilities of parties would entirely depend on the law of the country where the remedy might happen to be sought. Such a state of things would introduce uncertainty and confusion infinitely greater than arises from that measure of respect and comity which every tribunal now shows to the law of foreign nations."

Therefore, the Bills of Exchange Act, 1882, provides that where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined generally by the law of the place in which the contract was made, or the act was done or to be done:[7] provided that, where an inland bill has been indorsed in a foreign country, the indorsement, as regards the payer, is to be interpreted by the law of this country.[8] The validity as regards requisites in form is

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[1] Act of 1882, s. 71 (2).

[2] S. 71 (3).

[3] S. 71 (4); *Holdsworth* v. *Hunter*, 10 B. & C. 449; 34 R. R. 479.

[4] S. 69. See *Blackie* v. *Fidding*, 6 C. B. 196; *Charnley* v. *Grundy*, 14 C. B. 608.

[5] S. 70.

[6] Byles on Bills, 383.

[7] S. 72. See *Alcock* v. *Smith*, [1892] 1 Ch. 238.

[8] S. 72 (2).

determined by the law of the place of issue; as regards requisites in form of the supervening contracts, as acceptance or indorsement, by the law of the place where such contract was made.[1]

Cheques.

Cheques.

The Bills of Exchange Act, 1882, also deals with cheques, and generally reproduces with slight additions the Crossed Cheques Act, 1876.[2] A cheque is defined to be "a bill of exchange drawn on a banker payable on demand:" and generally the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque.[3]

Presentment for payment.

Subject to the permitted excuses for delay or non-presentment for payment,[4] the Act provides:—[5]

> (1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.
>
> (2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.
>
> (3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

This section effected a change in the law:—

"It was introduced to mitigate the rigour of the common law rule. At common law the mere omission to present a cheque for payment did not discharge the drawer, until at any rate six years had elapsed, and in this respect the common law appears to be unaltered. But if a cheque was not presented within a reasonable time, as defined by the cases, and the drawer suffered actual damage by the delay, *e.g.*, by the failure of the bank, the drawer was absolutely discharged, even though ultimately the bank might pay (say) fifteen shillings in the pound."[6]

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[1] S. 72. See *Horne* v. *Rouquette*, 3 Q. B. D. 514; *Re Marseilles Co.*, 30 Ch. D. 598. See Chalmers, 4th edit. Intro., p. xl.

[2] 39 & 40 Vict. c. 81; repealed by s. 96 of the Act of 1882.

[3] S. 73; *M'Lean* v. *Clydesdale Banking Co.*, 9 App. Cas. 95.

[4] S. 46, *ante*, p. 178.

[5] S. 74.

[6] Chalmers on Bills of Exchange, p. 247.

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Banker's duty and authority;

The relation of banker and customer is that of debtor and creditor; the customer is the creditor, and has a right to draw cheques on the banker to the extent of the amount for which he is creditor. If the banker, having sufficient funds of the customer in his hands, dishonours his customer's cheque, he is liable to him in an action. If the bank have several branches, a customer having an account at one branch is not generally entitled to draw on another branch.[1]

determination of.

A banker's duty and authority to pay his customer's cheque are determined by countermand of payment,[2] or by notice of his customer's death;[3] also by the fact that a receiving order in bankruptcy has been made against his customer, or by notice that he has committed an available act of bankruptcy.[4]

A cheque taken in payment remains the property of the payee so long as it remains unpaid. When paid the banker is entitled to keep it as a voucher till his account is settled; after that the drawer is entitled to it as a voucher between him and the payee.[5]

Crossed cheques.

General.

A cheque is crossed *generally* by the addition across its face of the words "and company," or any abbreviation thereof, between two parallel transverse lines, either with or without the words "not negotiable," or of such lines simply, either with or without the words "not negotiable."[6]

Special.

It is crossed *specially* by the addition across its face of the name of a banker, either with or without the words "not negotiable."[7]

Crossing by drawer, or after issue.

As to crossing, the Act of 1882 provides:—[8]

(1.) A cheque may be crossed generally or specially by the drawer.

(2.) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3.) Where a cheque is crossed generally, the holder may cross it specially.

(4.) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

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[1] Chalmers, p. 252. As to branch banks, see *Prince* v. *Oriental Bank*, 3 App. Cas. 325.

[2] S. 75. *Cohen* v. *Hale*, 3 Q. B. D. 371.

[3] S. 75. *Rogerson* v. *Ladbroke*, 1 Bing. 93.

[4] See s. 97, which provides that the rules in bankruptcy as to cheques shall apply. See *Vernon* v. *Hankey*, 2 T. R. 113; 1 R. R. 444.

[5] *Charles* v. *Blackwell*, 2 C. P. D. 162.

[6] S. 76 (1).

[7] S. 76 (2).

[8] S. 77.

(6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

Material part of cheque.

The crossing is a material part of the cheque and may not lawfully be obliterated, or, except as authorized by the Act, be added to or altered.[1]

Duties and liabilities of banker as to crossed cheque.

A banker on whom a cheque is drawn who pays it, if crossed generally, otherwise than to a banker, or, if crossed specially, otherwise than to the banker to whom it is crossed, is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.[2] But if the cheque is apparently not crossed, or an obliteration or alteration of the crossing is not apparent, the banker who pays in good faith without negligence is protected.[2]

Protection to banker and drawer.

Where a banker on whom a cheque is drawn pays it, if crossed generally, to a banker, or, if crossed specially, to the banker to whom it is crossed, in good faith and without negligence, such banker, and, if the cheque has come to the hands of the payee, the drawer, have the same rights and are in the same position as if payment had been made to the true owner of the cheque.[3]

Cheque crossed "not negotiable."

Where a person takes a crossed cheque "not negotiable," he neither has, nor can give, a better title to it than that which the person from whom he took it had.[4] Therefore, if such a cheque be stolen and afterwards be cashed by (say) a tradesman in good faith, he does not get, and cannot give, a better title to it than the thief.

Protection to collecting banker.

Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has either no title or a defective title to it, the banker is not liable to the true owner by reason only of having received such payment.[5]

Forged indorsement.

A banker who in good faith pays his customer's genuine cheques held under a forged or unauthorized indorsement, is deemed to have paid it in due course, and is entitled to debit his customer with the amount.[6]

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[1] S. 78.

[2] S. 79.

[3] S. 80.

[4] S. 81. As to the conditions necessary to make a cheque not negotiable, see *National Bank* v. *Silke*, [1891] 1 Q. B. 435.

[5] S. 82. See *Kleinwort* v. *Comptoir National*, [1894] 2 Q. B. 157; *Lacave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148; *Clarke* v. *London Bank*, *Id.* 552.

[6] 16 & 17 Vict. c. 59, s. 19, repro-

Promissory Notes.

Promissory notes.

Besides cheques, the Bills of Exchange Act, 1882, also deals with promissory notes.

The following is a form of promissory note :—

London, 1st April, 1887.

£100.

Two months after date I promise to pay to Mr. John Jones or order one hundred pounds for value received.

Benjamin Brown.

"At common law," says Mr. Justice Byles,[1] "no note of hand was transferable; and before the stat. 3 & 4 Anne, c. 9,[2] it was the opinion of Lord Holt and nearly all the judges, that no action could be maintained, even by the payee, on a promissory note as an instrument, but that it was only evidence of a debt. That statute first made promissory notes assignable and indorsable, like bills of exchange, and enabled the holder to bring his action on the note itself."

Definition.

By the Act of 1882, a promissory note is defined to be "an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer."[3]

If drawn payable to the maker's order, it is not a note within this section until indorsed by him.[4] It may contain also a pledge of collateral security with authority to sell or dispose thereof.[5]

Inland or foreign.

An inland note is one which is, or on the face of it purports to be, both made and payable within the British Isles; any other note is a foreign note.[6]

Delivery necessary.

Like a bill of exchange, which is incomplete and revocable until delivery,[7] a note is inchoate only and incomplete until delivery, actual or constructive, to the payee or bearer.[8]

Joint and several.

But, unlike a bill of exchange, it may be made by two or more makers liable jointly, *or* jointly and severally, according to its tenour.[9] Where it runs "I promise to pay," but is signed by

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duced by s. 60 of the Act of 1882, *ante*, p. 175; see *Charles* v. *Blackwell*, 2 C. P. D. 156.

[1] Byles on Bills, 7.

[2] Repealed by 45 & 46 Vict. c. 61.

[3] S. 83 (1). See *Kirkwood* v. *Smith*, [1896] 1 Q. B. 582.

[4] S. 83 (2). See *Good* v. *Walker*, 61 L. J. Q. B. 736.

[5] S. 83 (3).

[6] S. 83 (4).

[7] S. 21, *ante*, p. 172.

[8] S. 84.

[9] S. 85 (1).

two or more, it is deemed their joint and several note.[1] Conversely, where it runs "we promise to pay," it is a joint note only.

Presentment for payment.

Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of indorsement, or the indorser will be discharged.[2] For determining what is reasonable time, regard must be had to the nature of the instrument, the usage of trade, and the facts of the particular case;[3] but, unlike a bill of exchange, the note is not to be deemed overdue, so as to affect the holder with defects of title of which he had no notice, because a reasonable time for presenting it for payment has elapsed since its issue.[4]

Where a note is in the body of it made payable at a particular place, presentment of it at that place for payment must be made, to render the maker or indorser liable; but otherwise presentment for payment is not necessary to render the maker liable.[5] But presentment for payment is always necessary to render an indorser liable.[6] Where a place of payment is indicated by way of memorandum only, presentment to the maker elsewhere, if sufficient in other respects, will suffice to render the indorser liable.[7]

Liability of maker.

The maker of a note engages that he will pay according to its tenour; and he is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.[8]

Application of provisions as to bills of exchange.

Subject as above, the provisions of the Act relating to bills of exchange apply, with the necessary modifications,[9] to promissory notes, except the provisions relating to (1) presentment for acceptance, (2) acceptance, (3) acceptance *supra* protest, and (4) bills in a set.[10] Where a foreign note is dishonoured, protest is unnecessary.[10]

In applying the provisions applicable, the maker of the note corresponds with the acceptor of a bill, and the first indorser with the drawer of an accepted bill payable to drawer's order.[11]

"I O U."

An "I O U" is an acknowledgment of debt merely, and does not amount to a promissory note. The following is a form :—

London, 1st April, 1887.

Mr. John Jones,
I O U £100.

Benjamin Brown.

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[1] S. 85 (2).

[2] S. 86 (1). See s. 10, *ante*, p. 170, as to when it is payable on demand.

[3] S. 86 (2). See s. 45 (2), *ante*, p. 178.

[4] S. 86 (3). See s. 36 (3), *ante*, p. 187.

[5] S. 87 (1).

[6] S. 87 (2). See ss. 45 and 46, *ante*, p. 178.

[7] S. 87 (3).

[8] S. 88.

[9] *Leeds Bank* v. *Walker*, 11 Q. B. D. 84.

[10] S. 89 (1), (3), (4).

[11] S. 89 (2).

It is evidence only of a debt due, and therefore does not require a stamp; but if it contains words converting it into a promissory note, for instance, amounting to an agreement to pay on a given day, it must be stamped as such.[1]

Securities for Bills of Exchange.[2]

If goods are sold to be paid for by bills drawn by the seller on and accepted by the buyer, and the buyer fails, or dishonours the bill, the lien of the seller as unpaid vendor[3] revives in the absence of special contract, if he has retained the goods, or can stop them *in transitu*.[4]

Where the drawer of a bill remits goods or securities to the drawee as cover and the latter fails, so that the former has to take up the bill, he is entitled to the return of any of the goods or securities remaining in specie in the hands of the drawee.[5] If the drawee accepts, he acquires,[6] but if he does not accept, he does not acquire,[7] a lien on the cover; and if he fails during the currency of the bill, or does not pay it at maturity, he loses any lien on the cover.[8]

If a bill be drawn on or accepted by a person who has in his hands funds of the drawer, or who is indebted to the drawer in a sum sufficient to meet it, the bill does not operate as an assignment of the funds or debt to the drawee;[9] but such assignment can be effected by a collateral agreement.[10]

Where a bill is on the face of it expressed to be drawn against specified cover, the holder acquires no charge on the cover if the bill be dishonoured;[11] but such charge can be created by express agreement. This rule is subject to the exception that where the estates of two insolvent parties, both liable in respect of a bill to the holder, are being administered by the Court, and one of these parties holds cover belonging to the other of them, the holder is entitled to have the cover applied in payment of the bill if that

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[1] See Byles on Bills, Chap. IV.

[2] This subject is fully discussed in Chalmers on Bills of Exchange, 295, from which the following remarks are abbreviated.

[3] *Ante*, p. 60.

[4] *Ante*, p. 61.

[5] *Ex p. Broad*, 13 Q. B. D. 740.

[6] *Shepherd* v. *Harrison*, L. R. 5 H. L. 116.

[7] *Re Pavy's Co.*, 1 Ch. D. 631.

[8] *Ex p. Gomez*, 10 Ch. 639.

[9] Bills of Exchange Act, 1882, s. 53; *Shand* v. *Du Buisson*, 18 Eq. 283.

[10] *Thomson* v. *Simpson*, 5 Ch. 659.

[11] *Banner* v. *Johnston*, L. R. 5 H. L. 157.

cover remains unrealized at the time of the failure of the party holding it.[1]

Where a bill accepted for value is dishonoured and the drawer or an indorser has to pay it, he is entitled to the benefit of any securities which were deposited by the acceptor with the holder to secure the payment of the bill, and which the holder had in his possession at the time of the dishonour of the bill. The right is not dependent on express contract, but arises from the right of indemnity which the indorser paying the debt (who is a mere surety for the acceptor) has to be indemnified by the latter.[2]

Where an accommodation party is compelled to pay a bill, he is entitled to the benefit of any securities deposited by the person accommodated with the holder as security for the payment of the bill.[3]

Bank Notes—Dividend Warrants—Exchequer Bills.

Bank notes. Bank notes are promissory notes and therefore negotiable;[4] but their issue is subject to certain restrictions, having for their object the protection of the monopoly of the Bank of England.[5]

Dividend warrants. "Dividend warrants," *i. e.*, warrants issued by the Bank of England for the payment of dividends on government stock, are to be "deemed to be cheques within the meaning of the Bills of Exchange Act, 1882";[6] and the provisions of the Bills of Exchange Act, 1882, as to crossed cheques apply to dividend warrants;[7] but that Act is not to affect the validity of any usage relating to dividend warrants or the indorsement thereof.[8]

Exchequer bills. Exchequer bills are negotiable instruments.[9]

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[1] *Ex p. Waring*, 19 Ves. 345; 13 R. R. 217; *Powles* v. *Hargreaves*, 3 De G. M. & G. 430; *Re Mellor*, 12 Ch. D. 925; *Ex p. Dever*, 14 Q. B. D. 611. See per Lord Selborne, C., in *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 App. Cas. 384.

[2] *Duncan* v. *N. & S. Wales Bank*, 6 App. Cas. 1.

[3] *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372.

[4] *Miller* v. *Race*, 1 Burr. 452; 1 Sm. L. C. 447.

[5] 7 & 8 Vict. c. 32; 17 & 18 Vict. c. 83.

[6] National Debt Conversion Act, 1888 (51 Vict. c. 2), s. 30 (5).

[7] S. 95.

[8] S. 97 (3) (d).

[9] *Wookey* v. *Pole*, 4 B. & Ald. 1; 22 R. R. 594; *Brandao* v. *Barnett*, 12 Cl. & F. 787. The issue of exchequer bills is regulated by 29 & 30 Vict. c. 25; 40 & 41 Vict. c. 2, and 52 & 53 Vict. c. 6.

CHAPTER XIII.

TRADE MARKS AND TRADE NAMES.

Chap. XIII.

Principles.

The right to the exclusive use of a particular mark or name for purposes of trade rests on the fundamental rule "that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore, be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. A man may mark his own manufacture (or goods sold by him) either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself; and, if such symbol or emblem comes, by use, to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description."[1] That is to say, no man is entitled to represent his goods as being the goods of another man.[2]

If A. uses on his goods a mark already used by B. on goods of the same description, A. substantially represents the goods to be the manufacture of B., and so he deprives, or may deprive B. of the profit which B. might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy from B.[3] A man has no right thus to appropriate the benefit of another's reputation. The principle is that, if by any mark, or words, or form of doing up things,[4] goods are recognized in the trade as the goods of a particular person, the Court will protect him, that is to say, will restrain anyone from using the same mark or words,

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[1] Per Lord Kingsdown, *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 538; *Reddaway* v. *Banham*, [1896] A. C. 199, 209.

[2] Per James, L.J., *Singer Co.* v. *Loog*, 18 Ch. D. 412.

[3] *Seixo* v. *Provezende*, 1 Ch. 192; *Montgomery* v. *Thompson*, [1891] A. C. 217.

[4] The "get up" of the goods, as in *Siegert* v. *Findlater*, 7 Ch. D. 801; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Birmingham Co.* v. *Powell*, [1897] A. C. 710; see Sebastian, T. M., 146, 152.

or form of doing up,[1] so as to pass off the goods of the latter as the goods of the former.[2]

A trade mark has been defined as follows :—[3]

What is a "Trade Mark?"

"A trade mark means the mark under which a particular individual trades, and which indicates the goods to be his goods—either goods manufactured by him, or goods selected by him,[4] or goods which, in some way or other, pass through his hands in the course of trade. It is a mode of designating goods as being goods which have been, in some way or other, dealt with by A. B., the person who owns the trade mark."

And again :—

Trade marks are "marks placed on goods to indicate their origin, or their selection, or their importation, or some other trade qualification, and thereby to give information with regard to those goods to all persons trading in them. They are marks under which the trader trades."[5]

Trade mark denotes producer.

Using the word "producer" to mean the person who has made, or selected, or otherwise dealt with the goods, it may be observed that a trade mark denotes the producer and not the thing produced; that is to say, it distinguishes the goods from other goods of the same description produced by other persons: for the article to which it is applied may be one which all the world can and may lawfully make and sell. And herein a trade mark differs from a mere descriptive trade name; for a name may denote either the maker of the particular article in question or the nature of the article, by whomsoever made, that is, it may be merely an advertisement of the character and quality of the article.[6]

Descriptive words.

Therefore words in common use, merely descriptive of articles of a given kind, cannot be made trade marks; nor can words which simply define the nature, kind, or quality of the article.[7]

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[1] *Waterman* v. *Ayres*, 39 Ch. D. 36.

[2] *Re Van Duzer*, 34 Ch. D. 636.

[3] *Re Australian Wine Importers*, 41 Ch. D. 278, 280, per Kay, J.

[4] As to selectors, see *Hirsch* v. *Jonas*, 3 Ch. D. 584, 586; *Robinson* v. *Finlay*, 9 Ch. D. 487; *Re Wood's T. M.*, 32 Ch. D. 262, per Fry, L.J. As to importers, see *Re Apollinaris Co.*, [1891] 2 Ch. 226, per Fry, L.J. The trade mark of the producer cannot be registered as the trade mark of an importer, unless he has a monopoly of the whole of the producer's goods; *Re Apollinaris Co.*, *sup.*

[5] Per Fry, L.J., *Re Apollinaris Co.*, [1891] 2 Ch. 234.

[6] See *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 539, 546.

[7] *E. g.*, "Paraffin Oil": *Young* v. *Macrae*, 9 Jur. N. S. 322; *Lever* v. *Goodwin*, 36 Ch. D. 1 ("Self-washing" Soap); *Reddaway* v. *Banham*, [1896] A. C. 199. See as to descriptive words, Sebastian, T. M. 53, 62 n. (c), where the cases are collected.

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A trade mark may consist of words,[1] but they must be specific and distinctive in their meaning, that is, they must point to and distinguish the goods as being those of a particular producer and of no one else.

Name becomes *publici juris*.

But a word or words which originally constituted a trade mark, to the exclusive use of which a particular trader or his successors in trade may have been entitled, may subsequently become the denomination of the commodity itself, and no longer be a representation that the article is the manufacture of any particular person; as in the case of "Harvey's Sauce," which was originally the name of a sauce made by a particular individual, but became *publici juris*, that is to say, all the world were entitled to call the sauce they made "Harvey's Sauce," if they pleased.[2] The test whether a word which was originally a trade mark has become *publici juris* has been said to be "whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods"[2]. So, where an article has been patented, but the patent has expired, a proper name applied to the patented article may come to be the name of the article, and not a mark or sign indicating the manufacturer.[3] It may have been usually applied to goods made by a particular person, not because they are of his make, but because he, as having taken out a patent, could alone make them;[4] and he cannot prolong his monopoly by asserting an exclusive right to a trade mark in the name of the thing which was the subject of the patent.[5]

Expired patent.

But, though a person cannot claim the exclusive right to the use of a word which is, or has come to be, merely descriptive of the nature of the article, yet he can prevent others from using the name in such a way as to produce a belief that their goods are of his production.[6]

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[1] Subject to the effect of the Trade Marks Acts, *post*, p. 211.

[2] Per Mellish, L.J., *Ford* v. *Foster*, 7 Ch. 628; *Reddaway* v. *Bentham Co.*, [1892] 2 Q. B. 639; *Re Arbenz*, 35 Ch. D. 248; *National Starch Co.* v. *Munn's Co.*, [1894] A. C. 275.

[3] As the "Singer" sewing machine: see *Singer Co.* v. *Wilson*, 2 Ch. D. 434; 3 App. Cas. 376; *Singer Co.* v. *Loog*, 18 Ch. D. 395; 8 App. Cas. 15. See Sebastian, T. M. 59.

[4] *Young* v. *Macrae*, 9 Jur. N. S. 322; *Linoleum Co.* v. *Nairn*, 7 Ch. D. 834.

[5] *Wheeler* v. *Shakespear*, 39 L. J. Ch. 36; *Cheavin* v. *Walker*, 5 Ch. D. 850; *Re Ralph*, 25 Ch. D. 194, 199.

[6] *Siegert* v. *Findlater*, 7 Ch. D. 801

A trade mark may be used to denote not only manufactured goods, but even a natural product (*e.g.*, a mineral water), where no person other than the owner of the trade mark has the means of procuring that product, so that the mark indicates him as the person who supplies it.[1]

Trade mark for natural products.

A trade mark, properly so called, must be in some way attached to the article sold. It may be affixed to or impressed upon the goods themselves by means of a stamp or brand or adhesive label, or it may be made to accompany the goods by being impressed on or made to adhere to an envelope or case containing the goods, or it may be worked into the material or be some peculiar form of the material itself, as in a case where it consisted of a heading of certain coloured lines in the hem or fringe of cloth.[2] In all these cases it is intended to show that the goods are produced or sold by some particular person. Here, again, a difference is to be noted between the use of a trade mark and that of a mere trade name not affixed to particular goods, in that the mark accompanies the goods into whosesoever hands they come, whereas, if A. sells goods, calling them or invoicing them by a name which causes the immediate purchaser, C., to suppose them to be goods produced by B., but which is not affixed to the goods, it does not follow that persons who buy the goods from C. will also be deceived as to the origin of the goods.

Trade mark must be affixed to goods.

Further, the right to a trade mark exists only in connection with the particular species of manufacture or vendible commodity to which it has been applied by the person asserting the right.[3] If he has used it, for example, only on carriages, that would not prevent a manufacturer of woollen goods from putting it as a trade mark upon woollen goods,[4] for "there is no exclusive ownership of the symbols which constitute a trade mark apart from the

Goods of same description.

("Angostura Bitters"); *Birmingham Co.* v. *Powell*, [1897] A. C. 710, 717; *Reddaway* v. *Banham*, [1896] A. C. 199, 210; *Parsons* v. *Gillespie*, [1898] A. C. 239; cf. *Montgomery* v. *Thompson*, [1891] A. C. 217 ("Stone Ale"), see per Lord Macnaghten, at p. 225; *Eno* v. *Dunn*, 15 App. Cas. 252 ("Fruit Salt"), see at pp. 260, 261, per Lord Herschell, p. 263, per Lord Macnaghten. And consider the remarks of Lord Selborne, in *Re Leonard*, 26 Ch. D. 288, 296; and of Cotton, L.J., in *Re Arbenz*, 35 Ch. D. 248, at p. 262. And see *Lever* v. *Goodwin*, 36 Ch. D. 1; *Hart* v. *Colley*, 44 Ch. D. 193.

[1] Sebastian on T. M., 5; *Re Apollinaris Co.*, [1891] 2 Ch. 186.

[2] See *Singer Co.* v. *Wilson*, 2 Ch. D. 441; and *Mitchell* v. *Henry*, 15 Ch. D. 181.

[3] *Ainsworth* v. *Walmisley*, 1 Eq. 518.

[4] *Singer* v. *Wilson*, 2 Ch. D. 443.

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use or application of them";[1] "a trade mark consists in the exclusive right to the use of some name or symbol as applied to a particular manufacture or vendible commodity,"[2] and consequently the use of the same mark in connection with a different article is not an infringement of such right.

Names of persons as trade marks.

The name of a person or firm may be a trade mark; but the right to the exclusive use of such a mark exists only as against persons bearing a different name, and cannot be maintained as against a person or firm bearing the same name and using it *bonâ fide* without fraud for trade purposes.[3] But it is otherwise if he uses his own name with such additions as to deceive the public into the belief that his wares are those of another trader.[4] The test has been said to be whether he uses the name honestly and fairly in the ordinary prosecution of his business, or dishonestly, to palm off his own commodity as the production of another.[5]

Function of a trade mark.

The function of a trade mark may be regarded as two-fold, for it not only serves to secure to the producer the custom of persons who desire to purchase his goods, but it also indicates to a purchaser that he may take it as a guarantee that the goods came from the particular producer whose goods he desires to obtain,[6] and the protection of the public from imposition is recognised as one of the objects of trade mark law.

Whether "property" in a trade mark.

It was at one time said that there cannot be property in a trade mark, and that the ground of the jurisdiction, both at law and in equity, was the fraud of the defendant.[7] It is true that there cannot be said to be an absolute kind of property in a trade mark,[8] for, as we have before observed, there is no exclusive right to the mark universally in the abstract, *i.e.*, apart from its use in connection with a particular species of goods. But the *dicta* which are to be found in the cases, to the effect that there is no property

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[1] Per Ld. Westbury, C., *Leather Cloth Co.* v. *American Co.*, 4 De G. J. & S. 142; *Somerville* v. *Schembri*, 12 App. Cas. 453.

[2] Per Westbury, C., *Hall* v. *Barrows*, 4 De G. J. & S. 150, 158; *Ainsworth* v. *Walmisley*, 1 Eq. 518.

[3] *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Turton* v. *Turton*, 42 Ch. D. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Saunders* v. *Sun Co.*, [1894] 1 Ch. 537; Sebastian, T. M., 27 *et seq.*

[4] *Holloway* v. *Holloway*, 13 Beav. 209.

[5] See Sebastian, T. M., 29.

[6] *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748, 755.

[7] Ld. Langdale in *Perry* v. *Truefitt*, 6 Beav. 66; Wood, V.-C., in *Collins* v. *Brown*, 3 K. & J. 423.

[8] Wood, V.-C., in *Farina* v. *Silverlock*, 1 K. & J. 515.

in a trade mark, must be understood to mean no more than this;[1] and it has been laid down that "the true principle would seem to be that the jurisdiction of the Court" (by which the jurisdiction in equity appears to be intended) "in the protection given to trade marks rests upon property";[2] that the right to a trade mark, being one which is protected by the Court, and which may be bought and sold, is, in that sense of the word, "property."[3]

Lord Blackburn[4] treats it as having been established, before the Trade Marks Act of 1875, that when a person had used a mark on his goods, so as to distinguish them from the goods of any other person, he had a property in that mark to such an extent as to entitle him to an injunction to prevent any other person from continuing to use on other goods (of a similar kind) a mark so similar to his mark as in fact to mislead the public into taking them for those of the person who owned the mark; that this was on the ground that the right to use the mark was his property, and that therefore it was not necessary for the purpose of prevention (*i.e.*, in order to obtain an injunction) to prove fraud or an intention to mislead. "I think," he said,[5] "that at least from the time of *Millington* v. *Fox*,[6] decided by L. C. Cottenham in 1838, to *Wotherspoon* v. *Currie*,[7] decided by this House in 1872, it has been considered that, for the purpose of preventing infringement, the exclusive right to use a trade mark was a right of property."

Lord Cairns pointed out that there are many cases in which a trade mark has been used not merely improperly, but fraudulently, and where this fraudulent use has been adverted to and made the ground of decision; "but," said his lordship, "I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. . . . . A man may take the trade mark of another ignorantly, not knowing it was the trade mark of the other; or he may take it in the belief, mistaken, but sincerely entertained, that

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[1] Ld. Westbury, C., in *Hall* v. *Barrows*, 4 De G. J. & S. 150, 158.

[2] Ld. Westbury, C., *Leather Cloth Co.* v. *American Co.*, 4 De G. J. & S. 137, 142. See per Ld. Cranworth, in S. C., 11 H. L. C. 523, 533, 534.

[3] Wood, V.-C., in *Ainsworth* v. *Walmisley*, 1 Eq. 518.

[4] *Orr-Ewing* v. *Registrar of T. M.*, 4 App. Cas. 479, 494; but see per Ld. Herschell, *Reddaway* v. *Banham*, [1896] A. C. 199, 209.

[5] *Orr-Ewing* v. *Registrar of T. M.*, *sup.* at p. 494.

[6] 3 My. & Cr. 338. See the remarks of Cotton, L.J., on this case in *Proctor* v. *Bayley*, 42 Ch. D. 400.

[7] L. R. 5 H. L. 508.

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in the manner in which he is taking it he is within the law and doing nothing which the law forbids; or he may take it knowing it is the trade mark of his neighbour, and intending and desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same. The action of the Court must depend on the right of the plaintiff and the injury done to that right. What the motive of the defendant may be, the Court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them."[1]

It was remarked by Wood, V.-C.,[2] that, though the Court would grant an injunction where no evil intent could be attributed to the defendant, yet even in such a case the ground of the interference is still fraud, because, while a Court of law might think a defendant not liable to an action for an act done *absente animo malo*, a Court of equity may, quite consistently with this, hold that, if he continue to do the act, he will commit a fraud, and therefore in reality the jurisdiction does rest on the equity of preventing one person from committing a fraud on another.

Distinction between law and equity.

It must, however, be observed that though, for purposes of equitable relief by way of injunction, the question whether the defendant had any intention, by using the mark, to pass off his goods as those of the plaintiff,[3] or even whether he knew that he was using a mark which belonged to the plaintiff, is immaterial,[4] yet in an action at law for damages the plaintiff must prove fraud, or at least knowledge on the part of the defendant,[5] and in equity, if he asks for an account of profits or for damages, he can obtain this relief only in respect of user continued by the defendant after he became aware of the plaintiff's rights,[6] or at least knew that the

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[1] *Singer Co.* v. *Wilson*, 3 App. Cas. 376, 391, and see per Ld. O'Hagan, *ib.* 396, and the judgment (cited *ib.* 392, by Ld. Cairns), of Wood, V.-C., in *Welch* v. *Knott*, 4 K. & J. 747. And see per Bacon, V.-C., in *Singer Co.* v. *Loog*, 18 Ch. D. 403.

[2] *Leather Co.* v. *American Leather Co.*, 1 H. & M. 287.

[3] *Somerville* v. *Schembri*, 12 App. Cas. 453.

[4] See per Jessel, M.R., *Singer Co.* v. *Wilson*, 2 Ch. D. 442.

[5] See per Ld. Blackburn, *Singer* v. *Loog*, 8 App. Cas. 29—32; see per James, L.J., in *Mitchell* v. *Henry*, 15 Ch. D. 181, 191; *Reddaway* v. *Bentham Co.*, [1892] 2 Q. B. 639.

[6] *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185, 199, per Ld. Westbury, C. See *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 Beav. 578.

trade mark was not his own, though he may not have known to whom it belonged.[1]

Account of profits—damages.

In equity a plaintiff may elect between having an account of profits,[2] or damages.[3] At law, in order to obtain substantial damages, it was necessary to prove that an injury had been actually done; in equity, so far as the right to an injunction is concerned, it is sufficient to show that the defendant threatens to do, and will, if not prevented, do that injury;[4] and it becomes a mere question of fact whether that which the defendant is doing is reasonably likely to cause his goods to be mistaken for the plaintiff's manufacture. It is not necessary for the plaintiff to give evidence of deception in fact, *i.e.*, to prove instances in which customers have purchased the defendant's goods in the belief that they were produced by the plaintiff,[5] though, in practice, such evidence is generally relied on as a proof of the probability of mistakes.

Deception of ultimate purchaser.

The question in trade mark cases is whether the ultimate purchaser is likely to be misled by the acts of which the plaintiff complains; and it is no defence to show that the immediate purchaser would not be misled; for "no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade mark as will enable any dishonest trader into whose hands his goods may come to sell them as the goods of his rival."[6] The question is whether the defendant has put into the hands of others the means of deceiving the ultimate purchasers.[7] Even if the maker of the goods expressly tells the immediate purchaser that they are of his own manufacture, that will not save him from an injunction if they are sold with the plaintiff's trade mark attached to them, and in such a case all the plaintiff has to do is to show that his trade mark has been taken, that is, that the defendant has used an essential portion of the plaintiff's trade mark

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[1] Seb. T. M. 252, 256.

[2] See *Ford* v. *Foster*, 7 Ch. 611; *Harrison* v. *Taylor*, 11 Jur. N. S. 408; 12 L. T. 339.

[3] The damages will be merely nominal in absence of proof of actual damage; Seb. T. M., 178, 256. As to proof of actual damage, see *Leather Co.* v. *Hirschfeld*, 1 Eq. 299.

[4] Per Ld. Blackburn, *Singer Co.* v. *Loog*, 8 App. Cas. 30.

[5] *Johnston* v. *Orr-Ewing*, 7 App. Cas. 219; *Edelsten* v. *Edelsten*, 1 De G. J. & S. at p. 200; *Hookham* v. *Pottage*, 8 Ch. 91.

[6] Ld. Watson, in *Johnston* v. *Orr-Ewing*, 7 App. Cas. 232.

[7] James, L.J., *Singer Co.* v. *Loog*, 18 Ch. D. 412; Chitty, J., *Lever* v. *Goodwin*, 36 Ch. D. 3.

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upon goods of a similar description.[1] It is not necessary to show that the mark used by the defendant is absolutely identical with that of the plaintiff; it is sufficient if it is so like it that unwary or ignorant purchasers[2] would probably be misled. It is no answer to say that the purchasers were incautious, for "the loss to the plaintiff of the custom of an incautious purchaser is as great a damage as the loss of that of a cautious one."[3]

The Trade Marks Acts, 1875—1888.

The principles of trade mark law were established before and are independent of any statutes, but we have now to consider the scope and effect of the modern legislation, embodied originally in the Trade Marks Registration Act, 1875,[4] which, together with amending Acts of 1876[5] and 1877,[6] has been repealed and replaced by the Patents, Designs and Trade Marks Act, 1883,[7] as amended by the Patents, Designs and Trade Marks Act, 1888.[8]

Object of the Acts.

The objects of these enactments[9] appear to be:—(1) To place restrictions on the bringing of actions for infringement of trade marks, by requiring that a trade mark shall be registered before any such action can be brought; (2) to facilitate evidence of title to trade marks by means of registration; and (3) to define the symbols or devices which the law will recognize as trade marks; and to protect the public by cutting down the numerous forms of words and other things by the use of which traders tried to secure to themselves exclusive rights; for, after the passing of the Act of 1875, certain things only could be registered, subject to this, that if a right had been acquired by user before that date to a particular device or form of words as a trade mark, then it might be registered under the Act, although it did not come within the definition of what could otherwise be registered as a trade mark under the Act.[10]

Effect of the Acts.

It has been suggested that the effect of the Acts may be to give the registered proprietor of a trade mark a right so absolute that he may maintain an action to prevent another person from selling

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[1] Per Jessel, M.R., *Singer Co.* v. *Wilson*, 2 Ch. D. 442, 443.

[2] *Ford* v. *Foster*, 7 Ch. 627.

[3] Per Lord Blackburn, *Johnston* v. *Orr-Ewing*, 7 App. Cas. 229. See *Singer Co.* v. *Loog*, 8 App. Cas. 15, 18, 20; see Cotton, L.J., in S. C., 18 Ch. D. 395, 422.

[4] 38 & 39 Vict. c. 91.

[5] 39 & 40 Vict. c. 33.

[6] 40 & 41 Vict. c. 37.

[7] 46 & 47 Vict. c. 57.

[8] 51 & 52 Vict. c. 50.

[9] See *Edwards* v. *Dennis*, 30 Ch. D. 464, 470; *Re Van Duzer*, 34 Ch. D. 623, 634.

[10] See *post*, pp. 210, 212, as to "old" marks.

goods with that mark upon them without reference to the question whether or no the goods are sold under such circumstances as to pass them off as the goods of the plaintiff; but Cotton, L.J., while declining to express an opinion on that point, laid it down that the principles on which the Court proceeds are not altered by the Acts,[1] which (speaking generally) do not give new rights.[2] Since the Acts, as before, the plaintiff, assuming that he has title under them, "is bound to show, either that the defendant has taken the whole or a substantial portion of his trade mark, or that the defendant has used his, the plaintiff's, trade mark in such a manner as to lead the public to believe that his, the defendant's, goods are the plaintiff's."[3] The Act of 1875, it has been said, was intended to effect a great and fundamental change in the law, viz., that whereas before that Act the property in any trade mark could be obtained only by user, or, in the case of cutlery goods, by an assignment by the Cutlers' Company (see *post*, p. 216), under the Act a mode of acquiring a right in a trade mark was given mainly by registration; and accordingly the Act enabled a person who had invented a trade mark, which had not been previously used by some other person, to obtain registration of it and to treat its being on the register as evidence of public user or equivalent to public user, and so the Act gave a new title to the exclusive use of a trade mark.[4] It is now established, after some doubts had been expressed on this point,[5] that a mark may be registered, though there has been no such user of it as to give a right independently of the Acts.[6] But a person cannot be allowed to register a trade mark, and thus preclude all other persons from using it, without ever using it himself or intending to use it.[7]

Registration under the Acts, it is submitted, must be notice to all persons of the right of the registered proprietor of a trade mark. A man who sells his goods and affixes thereto a device that is a real trade mark, is bound to go and look at the register and see if anybody else is proprietor of that device, and, if he

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[1] *Mitchell* v. *Henry*, 15 Ch. D. 193.

[2] *Re Lyndon*, 32 Ch. D. 117.

[3] Per Fry, L.J., *Edwards* v. *Dennis*, 30 Ch. D. 478.

[4] Per Fry, L.J., *Re Hudson*, 32 Ch. D. 325, 326.

[5] See *Edwards* v. *Dennis*, 30 Ch. D. 473, 479.

[6] *Re Hudson*, 32 Ch. D. 311, 318. And cf. 46 & 47 Vict. c. 57, s. 66, which speaks of the registration of marks "used or proposed to be used."

[7] Per Fry, L.J., *Re Apollinaris Co.*, [1891] 2 Ch. 186, 234; *Re Batt*, [1898] 2 Ch. 432.

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does not, he must take the consequences;[1] and therefore in such cases the question whether the alleged infringer did in fact know that he was infringing would seem to be precluded.

The Trade Marks Act, 1875.

The scheme of the Act of 1875 (which is in substance that of the Acts now in force), was as follows. It established a register of trade marks[2] and their proprietors, and then made registration in pursuance of the Act a condition precedent to the right to institute proceedings to prevent, or recover damages for, infringement, except in the case of trade marks in use before the 13th August, 1875, as to which it was provided that no such proceedings should be instituted until and unless registration had been made or refused.[3] A trade mark was required to be registered "as belonging to particular goods or classes of goods,"[4] and, for the purposes of the Act, was defined as consisting of certain "essential particulars."[5]

Trade Marks Acts, 1883 to 1888.

The law as to registration of trade marks is now contained in the Patents, Designs and Trade Marks Acts, 1883 to 1888.[6] The Act of 1883 gave power to the Board of Trade to make general rules for regulating the practice of registration under the Act.[7] Under this provision the rules now in force are the "Trade Marks Rules, 1890 and 1897."[8]

Registration.

Registration[9] is to be obtained by an application to the Comptroller-General of Patents, Designs and Trade Marks at the prescribed place.[10] For the purposes of registration, goods are classified in the manner appearing in the third schedule to the Rules of 1890,[11] and registration must be applied for in respect of particular goods or classes of goods.[12]

Series of marks—colours.

A person claiming to be the proprietor of several trade marks "resembling each other in the material particulars thereof," but

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[1] Per Jessel, M.R., *Re Palmer*, 21 Ch. D. 58.

[2] "Not generally, but of trade marks as defined by the Act"; per Lord Cairns, C., *Orr-Ewing* v. *Registrar of T. M.*, 4 App. Cas. 479, 483.

[3] 38 & 39 Vict. c. 91, s. 1, as amended by 39 & 40 Vict. c. 33, s. 1; Seb. T. M. 388.

[4] S. 2.

[5] S. 10.

[6] 46 & 47 Vict. c. 57; 48 & 49 Vict. c. 63; 51 & 52 Vict. c. 50.

[7] S. 109.

[8] They will be found in the Weekly Notes for 11th January, 1890 (p. 17), and in Lawson on Patents, 563—586.

[9] 46 & 47 Vict. c. 57, ss. 62, 78, 79, as amended by 51 & 52 Vict. c. 50, ss. 8, 19.

[10] See Trade Marks Rules, 1890, r. 8; as to metal goods (Sheffield marks), see *post*, p. 216.

[11] Rules, 1890, r. 6.

[12] Act of 1883, ss. 62 (3), 65. See *post*, p. 214.

differing in respect of the goods for which they are to be registered, or statements of numbers, price, quality, or names of places, may have them registered as a series in one registration;[1] and trade marks may be registered in any colour or colours.[2]

Appeal. Discretion of comptroller.

If the comptroller refuses registration when there is no opposition, the applicant may appeal to the Board of Trade, who may refer the appeal to the High Court of Justice.[3] There is no right of appeal direct from such refusal to the Court.[4] It has been laid down in the House of Lords[5] that, though the comptroller has a discretion, and no absolute right to registration is given to an applicant for registration of a trade mark, the meaning and intent of the statute is that the trade mark ought to be registered, unless for some of the reasons contemplated by the statute there is an objection to the registration; as where the proposed mark is obnoxious to the provision which forbids registration of words the use of which would be "calculated to deceive,"[6] by which is meant not "designed to deceive," but likely in fact to deceive.[7]

Opposition to registration.

Applications for registration are advertised by the comptroller, unless he refuses to entertain the application[8]. Any person may, within a limited time, give notice of opposition to registration, and the comptroller, after hearing the applicant and the opponent, if so required, decides whether the trade mark is to be registered, but his decision is subject to appeal to the Board of Trade, which may, if it appears expedient, refer the appeal to the High Court of Justice.[9] Where there are conflicting claims to registration of the same trade mark, the comptroller may submit, or require the claimants to submit, their claims to the Court.[10]

Restrictions on registration.

Except where the Court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, the comptroller shall not register, in respect of the same goods or description[11] of goods, a trade mark identical with one already on

Identical marks.

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[1] Act of 1883, s. 66.

[2] *Ib.* s. 67, amended by s. 11 of the Act of 1888. See *Re Société Anonyme*, [1894] 2 Ch. 26.

[3] S. 62 (4), (5).

[4] *Re Normal*, 35 Ch. D. 231.

[5] *Eno* v. *Dunn*, 15 App. Cas. 252.

[6] S. 73, amended by s. 15 of the Act of 1888.

[7] *Re Lyndon*, 32 Ch. D. 109, 119, 121; *Re Société Anonyme*, [1894] 2 Ch. 26; *Re Loftus*, [1894] 1 Ch. 193.

[8] S. 68; s. 12 of Act of 1888.

[9] S. 69, amended by s. 13 of the Act of 1888.

[10] S. 71.

[11] *Re Australian Wine Importers*, 41 Ch. D. 278, 287.

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Similar marks.

the register,[1] or having such resemblance thereto as to be calculated to deceive;[2] and the fact that the proprietor of the mark already on the register consents to the registration of the other mark will not enable it to be registered.[3]

Deceptive or scandalous marks.

A person cannot register as part of, or in combination with, a trade mark, any words the use of which would, by reason of their being calculated to deceive, or otherwise be disentitled to protection in a Court, or any scandalous design.[4] And the comptroller may refuse to register a trade mark if the use would, in his opinion, be contrary to law or morality.[5]

Trusts.

No notice of any trust, expressed, implied, or constructive, may be entered on the register.[6]

Old and new marks.

Before we proceed to consider the sections defining the classes of marks which are capable of being registered as trade marks, it should be observed that the Acts now in force preserve a distinction, which was recognized by the Act of 1875,[7] between marks which had, and marks which had not, been in use as trade marks before the passing of that Act. The former are generally called "old marks," the latter "new marks;" and it will be seen that, whereas a new mark cannot be registered unless it contains one of the "essential particulars" specified in the statutes, an old mark may be capable of registration though it does not satisfy that requirement. The purpose of this distinction was to preserve vested rights which had been acquired by user before the Act of 1875.[8]

What marks may be registered.

By the Act of 1888,[9] amending in this respect the Act of 1883,[10] a trade mark, to be registered under the Acts, must contain at least one of the following "essential particulars":—[9]

Names.

(1) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

Signatures.

(2) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark;[11] or

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[1] S. 72 (1); *Re Dewhurst*, [1896] 2 Ch. 137; *Re Ehrmann*, [1897] 2 Ch. 495.

[2] S. 72 (2), as amended by s. 14 of the Act of 1888; *Re Price's Candle Co.*, 27 Ch. D. 681; *Re Apollinaris Co.*, [1891] 2 Ch. 186, 235, *ante*, p. 209.

[3] *Re Dewhurst*, *supra*; *Re Ehrmann*, *supra*.

[4] S. 73.

[5] S. 86.

[6] S. 85.

[7] 38 & 39 Vict. c. 91, s. 10.

[8] See *Orr-Ewing* v. *Registrar of T. M.*, 4 App. Cas. 495.

[9] S. 10.

[10] S. 64.

[11] An individual or firm cannot now register the signature of a predecessor in business (unless it was an "old mark," see Seb. T. M., 36, 37).

(3) A distinctive device,[1] mark, brand,[2] label, heading, or ticket;[3] or — Devices, &c.

(4) An invented word or invented words;[4] or — Words.

(5) A word or words having no reference to the character or quality of the goods, and not being a geographical name.[5]

Where, therefore, it has to be determined whether a given mark constitutes a trade mark capable of registration as such under the Act, the first duty cast upon the Court is to ascertain whether some one, or more than one, of the essential particulars of a trade mark, as defined by the Act, is found to exist, so that the mark may be described with the one, or more than one, essential particular or particulars which distinguish it.[6]

There may be added to any one or more of the "essential particulars" any letters, words, or figures,[7] or combination of letters, words, or figures.[8] In such case the application for registration must state "the essential particulars of the trade mark," and must disclaim[9] any right to the exclusive use of the added matter;[8] but the applicant need not disclaim his own name[10] or place of business.[11] — Non-essential additions. — Disclaimer.

There may also be added, in the case of marks not in use before 1875, "any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which — Addition of marks in common use.

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[1] *Rowland* v. *Mitchell*, [1897] 1 Ch. 71, the portrait of the manufacturer.

[2] As to a "brand," see *Pirie* v. *Goodall*, [1892] 1 Ch. 35.

[3] "Distinctive" is the emphatic word in this clause. It would seem that it means "distinguishing the manufacture of the person who has registered the trade mark from the manufacture of all other persons," see per Fry, L.J., *Re Wood*, 32 Ch. D. 247, 262; *Re Jackson Co.*, 60 L. T. 93. The distinctiveness must be independent of colour: *Re Hanson*, 37 Ch. D. 112. See Seb. T. M. 38, as to the various kinds of marks included in this class. In the corresponding clause of the Act of 1883, there was included "fancy word or words not in common use," as to which see *Re Van Duzer*, 34 Ch. D. 623, 639; *Waterman* v. *Ayres*, 39 Ch. D. 29; *Re Bovril*, [1896] 2 Ch. 600.

[4] This clause and the next seem to be substituted for "fancy words" in the Act of 1883; see last note. But these two clauses must not be read together; *Re Eastman Co.*, [1898] A. C. 571.

[5] *Re Magnolia Metal Co.*, [1897] 2 Ch. 371; *Re Holt & Co.*, [1896] 1 Ch. 711. See Seb. T. M. 47, 48.

[6] Per Lord Cairns, C., *Orr-Ewing* v. *Registrar of T. M.*, 4 App. Cas. 479, 484.

[7] *I.e.*, numerals; *Ex parte Stephens*, 3 Ch. D. 659.

[8] S. 64 (2) of the Act of 1883, as amended by s. 10 of the Act of 1888.

[9] *Re Goodall*, 42 Ch. D. 566; *Re Apollinaris Co.*, [1891] 2 Ch. 186, 211.

[10] *Re Colman*, [1894] 2 Ch. 115; *Re Smokeless Powder Co.*, [1892] 1 Ch. 590.

[11] S. 64 (3) (i), as amended by s. 10 of the Act of 1888.

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the application is made," subject to the same provisions as to disclaimer of right of exclusive user.[1]

Subsequent additions by leave of Court.

The registered proprietor of any trade mark may, by leave of the Court, add to or alter such mark in any particular, not being an "essential particular."[2]

"Common to the trade."

"Three Mark" Rule.

Words, or combinations of words, are to be deemed to be common to the trade if they have been "publicly used by more than three persons on the same or a similar description of goods."[3] This is analogous to the "Three Mark Rule," as to old marks, viz., that registration of the same, or substantially the same, mark may be granted to not more than three persons who can prove real user before 13th August, 1875, but that proof of user by more than three persons before that date debars all persons from registering.[4]

Old marks.

So far we have been dealing with "new marks."[5] With respect to "old marks," it is provided[6] that "any special and distinctive[7] word or words, letter, figure,[8] or combination of letters or figures, or of letters and figures, used as a trade mark before 13th August, 1875," may be registered as a trade mark[9] under the Act of 1883.

Provided, therefore, that the words, &c., are special and distinctive, and have been used before 13th August, 1875, as trade marks, they are capable of registration under the Acts, though they may not come within the definitions of marks capable of registration as "new marks," but the mark must have been used alone as the trade mark, and not in combination with other words or in combination with any device.[10]

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[1] S. 74 (2), as amended by s. 16 of the Act of 1888; *Re Smokeless Powder Co.*, *supra*.

[2] S. 92. See *Re Colman*, [1891] 2 Ch. 402; *Re Henry Clay*, [1892] 3 Ch. 549; and cases cited in Seb. T. M. 406.

[3] S. 74 (3). See *Re Wragg*, 29 Ch. D. 551; and *Burland* v. *Broxburn Oil Co.*, 42 Ch. D. 274, where Chitty, J., observed that this is not a definition of the term "common to the trade," but is only introduced in order to preclude questions as to the number of persons required to make the user common, and that the term means "open to the trade."

[4] Seb. T. M. 384, 385; *ib.* 58, 123, 376. The rule was first promulgated by the Commissioners of Patents. See *Re Walkden Co.*, 54 L. J. Ch. 394; *Re Hyde*, *ib.* 395; *Monson* v. *Boehm*, 26 Ch. D. 398, 407.

[5] See *ante*, p. 210.

[6] Act of 1883, s. 64 (3); Act of 1888, s. 10.

[7] See *Re Wood*, 32 Ch. D. 247, 262; *Re Hopkinson*, [1892] 2 Ch. 116, *ante*, p. 211.

[8] *I. e.*, numeral; *Ex parte Stephens*, 3 Ch. D. 659.

[9] See *Re Leonard and Ellis*, 26 Ch. D. 288, 296; *Re Harrison, McGregor & Co.*, 42 Ch. D. 691.

[10] *Re Palmer*, 24 Ch. D. 504; *Re Leonard and Ellis*, 26 Ch. D. 288, 295; *Perry Davis* v. *Harbord*, 15 App. Cas. 316, 321; *Richards* v. *Butcher*, [1891] 2 Ch. 522.

Registration of common marks as additions to old marks.

Power is given to register, as an addition to any old mark, "any distinctive device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade[1] in the goods with respect to which the application is made";[2] but there must be a disclaimer of any right to exclusive user of the additions.[3]

Three Mark Rule.

As to "old" marks, the rule referred to above (p. 212) is still acted on,[4] that identical or similar marks may be registered by different persons in respect of similar kinds of goods up to the number of three; but if the mark was used by more than three persons it is deemed common to the trade, and no registration is allowed.

Combination marks.

In the case of registered marks which comprise some additions to the "essential particular," and which are often called "combination marks," it would seem that, as the additions could not be registered alone, there is no infringement unless the "essential particular" is taken.[5]

Effect of registration.

Application for registration of a trade mark is to be deemed to be equivalent to public use of the trade mark;[6] and registration of a person as proprietor of a trade mark is to be *primâ facie* evidence of his right to the exclusive use of the trade mark, and after the expiration of five years from the date of registration is to be conclusive evidence of his right, subject to the provisions of the Act.[7]

The result of these provisions appears to be that during the period of five years the registered proprietor is qualified to sue an infringer, but the defendant may rebut the plaintiff's *primâ facie* right without moving[8] to expunge the mark from the register.[9] If the mark has been on the register for five years, that dispenses with the necessity of the plaintiff's adducing evidence of exclusive

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[1] *Ante*, p. 212.

[2] Act of 1883, s. 74 (1) (a). Observe that as to new marks the corresponding provision extends only to words or combinations of words.

[3] S. 74 (2); s. 16 of Act of 1888. See *ante*, p. 211.

[4] *Re Bancroft & Co.*, 5 R. P. C. 209.

[5] Seb. T. M. 368; *Re Horsbrugh*, 53 L. J. Ch. 237.

[6] Act of 1883, s. 75, amended by Act of 1888, s. 17; *Re Batt*, [1898] 2 Ch. 432. The meaning is that those things which can be registered as falling within the definitions of trade marks for the purposes of this Act are to be considered as trade marks even before they are registered, yet not so as to give any one the right to complain of the user of them until they have been registered; per Cotton, L.J., *Re Hudson*, 32 Ch. D. 319.

[7] S. 76.

[8] S. 90, as amended by s. 23 of Act of 1888.

[9] See Seb. T. M. 386.

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use;[1] but the defendant may nevertheless apply to have the register rectified by expunging the mark on the ground that it ought never to have been registered, as, for instance, if it was not a trade mark at all; for the Act was not intended to give the person who gets a mark placed on the register a right to enjoy that as a trade mark which never was a trade mark.[2]

Registration for entire class—user for part.

It has been laid down that a person who has registered a trade mark for the whole of one of the classes of goods (under the classification contained in the Rules, Schedule II.[3]), but, in fact, has used it for only part of the articles comprised in that class, cannot claim the exclusive right to use it for every article in the class.[4]

Misrepresentation in trade mark.

It should be noted that a plaintiff who would otherwise be entitled to maintain his action may be deprived of his right to sue if his trade mark contains a false representation likely to deceive the public,[5] as where he describes his goods as patent when he has not any patent;[6] but a mere collateral misrepresentation has not the same effect.[7]

Transfer of trade mark.

A trade mark, when registered, can be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods, or classes of goods, for which it has been registered, and is determinable with that goodwill.[8]

A series of trade marks (*ante*, p. 208) is assignable and transmissible only as a whole.[9]

The business must be co-extensive with the goods or classes of goods in respect of which the trade mark is registered; and the assignee has no exclusive right unless the business assigned is co-extensive with the trade mark as registered.[10]

Registered proprietor.

Provision is made[11] for entry on the register of persons entitled

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[1] Per Cotton, L.J., *Edwards* v. *Dennis*, 30 Ch. D. 454, 472.

[2] Per Jessel, M.R., *Re Palmer*, 21 Ch. D. 47, 58; *Re Wood*, 32 Ch. D. 247, 258, per Lindley, L.J.; *Re Wragg*, 29 Ch. D. 551; *Baker* v. *Rawson*, 45 Ch. D. 519, 531; *National Starch Co.* v. *Munn's Co.*, [1894] A.C. 275; *Re Batt*, [1898] 2 Ch. 432.

[3] See *ante*, p. 208.

[4] *Edwards* v. *Dennis*, 30 Ch. D. 454; *Hargreave* v. *Freeman*, [1891] 3 Ch. 39; *Re Batt*, [1898] 2 Ch. 432.

[5] *Ford* v. *Foster*, 7 Ch. 611.

[6] *Singer Co.* v. *Wilson*, 2 Ch. D. 434, 456. See Seb. T. M. 235.

[7] *Ford* v. *Foster*, 7 Ch. 611.

[8] Act of 1883, s. 70. See *Re Wellcome*, 32 Ch. D. 213; *Re Magnolia Metal Co.*, [1897] 2 Ch. 371; Seb. T. M. 108, 372.

[9] S. 66. See *ante*, p. 208.

[10] See *Edwards* v. *Dennis*, 30 Ch. D. 454, 479, per Fry, L.J.

[11] S. 87, amended by Act of 1888, s. 21. *Ex p. New Ormonde Co.*, [1896] 2 Ch. 520, where a company had changed its name after registration.

to registered trade marks "by assignment, transmission, or other operation of law."

Power to deal with trade mark.

The person for the time being entered in the register as the proprietor of a trade mark has, subject to other vested rights appearing on the register, power absolutely to assign, grant licences as to, or otherwise deal with the same; but any equities in respect of such trade mark may be enforced as in respect of any other personal property.[1]

Registration a condition precedent to suing for infringement.

A person is not entitled to institute any proceeding to prevent, or recover damages for,[2] the infringement of a trade mark (whether it be an old or a new mark) which is capable of registration under the Act unless it has been registered under the Act of 1883 or the former Acts.[3] But in the case of an "old mark," used before 13th August, 1875, and being one which is incapable of being registered, the right to sue for infringement is preserved in case an application has been made for registration and refused; and a certificate of such refusal may be obtained from the Comptroller.[4] The result is that the owner of a trade mark suing to prevent, or recover damages for, infringement must be able to produce a certificate of registration, if the mark, whether old or new, is capable of registration, or, if it be an old mark, a certificate of refusal of registration.

Nothwithstanding, however, that a plaintiff may be disentitled, or may fail, to maintain an action for infringement, he may yet obtain an injunction to restrain the use of a mark in such a way as to pass off the defendant's goods for those of the plaintiff.[5]

Rectification of register.

The High Court may, in its discretion, on the application of any person aggrieved,[6] order the register to be rectified by making,

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[1] S. 87, as amended by s. 21 of Act of 1888. Having regard to the provisions of s. 70 (*sup.*), it is doubtful whether such licences can be valid; see Seb. T. M. 221, 398.

[2] The corresponding section of the Act of 1875 (38 & 39 Vict. c. 91), s. 1, did not extend to proceedings to recover damages, but it was so extended by the Act of 1876 (39 & 40 Vict. c. 33), s. 1.

[3] Act of 1883, s. 77. See, for example, *Goodfellow* v. *Prince*, 35 Ch. D. 9.

[4] S. 77. See *Orr-Ewing* v. *Registrar of T. M.*, 4 App. Cas. 498, per Lord Blackburn.

[5] *E.g.*, see *Hart* v. *Colley*, 44 Ch. D. 193; *Thompson* v. *Montgomery*, 41 Ch. D. 35; [1891] A. C. 217.

[6] As to who is a "person aggrieved," see *Re Rivière*, 26 Ch. D. 48, 54; *Re Apollinaris Co.*, [1891] 2 Ch. 186, 224, 225, 228; *Powell* v. *Birmingham Co.*, [1894] A. C. 8. A person against whom an action is brought for infringement of a mark which ought never to have been registered, is a person aggrieved (*Baker* v. *Rawson*, 45 Ch. D. 519, 529), and therefore an action is frequently met by

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expunging, or varying entries in it;[1] and the comptroller may correct a clerical error,[2] and he may also cancel the entry or part of the entry of a trade mark upon proper application by the registered proprietor.

Sheffield marks.

Special provision is made by the Act of 1883,[3] for the registration at Sheffield by the Cutlers' Company, in a register to be called the Sheffield Register, of trade marks used on "metal goods" (which are defined as meaning all metals whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal) by any person carrying on business in Hallamshire, in the County of York, or within six miles thereof.[4]

International and colonial arrangements for protection of trade marks.

Where an arrangement has been made by the Crown with a foreign state for mutual protection of trade marks, and an Order in Council to such effect is in force, any person who has applied for protection for any trade mark in any such state is entitled to registration of his trade mark under the Patents, Designs, and Trade Marks Acts in priority to other applicants; and such registration is to have the same date as the date of application in such foreign state; but the application must be made within four months from his applying for protection in the foreign state.[5] The proprietor of the trade mark will not be entitled to recover damages for infringements happening before the actual registration of his trade mark in this country.[5] The prior use during such period in the United Kingdom or the Isle of Man of the trade mark will not invalidate the registration of the trade mark.[6] The application for the registration of a trade mark is to be made in the ordinary manner, except that any trade mark, the registration of which has been duly applied for in the country of origin, may be registered.[7]

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a motion or summons to expunge the plaintiff's mark from the register, as in *Edwards* v. *Dennis*, 30 Ch. D. 454; *Re Wood*, 32 Ch. D. 247. See Seb. T. M. 219, 399; and *ante*, p. 213.

[1] S. 90, amended by s. 23 of the Act of 1888; *Paine* v. *Daniells*, [1893] 2 Ch. 567; *Re Batt*, [1898] 2 Ch. 432.

[2] S. 91, amended by s. 24 of Act of 1888.

[3] S. 81, amended by s. 20 of Act of 1888.

[4] See as to Sheffield marks, Seb. T. M. 391 *et seq.*, and T. M. Rules, 1890, rr. 56—59; and as to the "Cutlers' Company's Acts," Seb. T. M., Appx. G. p. 598.

[5] S. 103 (1), amended by 48 & 49 Vict. c. 63, s. 6.

[6] S. 103 (2).

[7] S. 103 (3). See *Re Californian Fig Syrup Co.*, 40 Ch. D. 620; *Re Vignier*, 61 L. T. 495; *Re Carter Medicine Co.*, [1892] 3 Ch. 472. See the International Convention for the Protection of Industrial Property of 1883, in Seb. T. M. Appx. C. p. 527, and the list of Orders in Council applying the Act, *ib.* 534—536.

The above provisions may be applied by an Order in Council to any "British possession" (*i.e.*, any territory or place situate within Her Majesty's dominions other than the United Kingdom, the Isle of Man, and Channel Islands), the legislature of which has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country.[1]

Merchandise Marks Acts.

It should be added that under the Merchandise Marks Act, 1862,[2] the forgery of a trade mark was made a misdemeanour. This Act was repealed by the Merchandise Marks Act, 1887,[3] which makes it a punishable offence to forge or falsely apply to goods a registered trade mark; or to apply to goods any trade description which is materially false[4] as to the number, quality, measure, gauge,[5] or weight, or as to the place or country in which they were produced, or as to their mode of manufacture, or material, or as to their being the subject of an existing patent, privilege or copyright, or as to the person or firm who manufactured them; falsifying a genuine trade mark, by alteration, addition, effacement, or otherwise, is a forgery of it.

Trade Name.

Trade name.

There is no right by English law to the exclusive use of a name apart from its use in connection with a trade or business;[6] but the law recognizes a plaintiff's right to prevent others from personating his business by using any such description as would lead customers to suppose they were trading with the plaintiff;[7] and this rests on the principle, which is the ground of the law as to trade marks,[8] viz., that one man will not be allowed to pass off his goods as those of a rival trader, and thus to obtain the benefit of his rival's reputation and of custom intended for his rival. This principle applies equally to the use of a name which has been so appropriated by user as to come to mean the goods of a particular

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[1] Ss. 104, 117.

[2] 25 & 26 Vict. c. 88.

[3] 50 & 51 Vict. c. 28, amended by 54 Vict. c. 15. *Ante*, p. 66.

[4] *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90; *Kirschenboine* v. *Salmon*, [1898] 2 Q. B. 19.

[5] See *Budd* v. *Lucas*, [1891] 1 Q. B. 408.

[6] *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 430.

[7] Per Giffard, V.-C., *Boulnois* v. *Peake*, 13 Ch. D. 513, n.

[8] See *Glenny* v. *Smith*, 2 Dr. & Sm. 476, 480; *Levy* v. *Walker*, 10 Ch. D. 436; *Goodfellow* v. *Prince*, 35 Ch. D. 9.

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producer, though it has never been impressed on or affixed to goods and is not a trade mark properly so called.[1]

A "trade name" may be that of a person, or firm,[2] or company,[3] or that of the establishment at which the trade is carried on;[4] or it may be a name under which goods are known in the market as being made or sold by a particular person, firm or company;[5] and a man has a right to prevent other persons from using a name, real or fictitious, or a description, whether true or not, which is calculated to represent, *i.e.*, which has the effect, whether intended or not,[6] of representing to the world that the goods produced by A. are goods produced by B., on the ground that B., having established a business reputation under a particular name, has a right to prevent anyone else from injuring his business by using that name.[7]

In cases of trade name, as in those of trade marks,[8] the right to relief has been sometimes rested on the ground of fraud in the defendant; but it seems to be settled that the plaintiff need not allege the defendant's act in using the name to be fraudulent, or even that he knew of the plaintiff's right to its use,[9] but only that the use by the defendant is such as to be reasonably likely to cause the defendant's goods to be taken for those of the plaintiff,[10] and that the plaintiff need not prove that any customer has in fact been deceived.[11] "All the Court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two—so calculated to do it that when it is drawn to the attention of those adopting the name complained of that that

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[1] *Singer Co.* v. *Loog*, 8 App. Cas. 15, 32, per Lord Blackburn.

[2] *Levy* v. *Walker*, 10 Ch. D. 436.

[3] *Lee* v. *Haley*, 5 Ch. 155; *Braham* v. *Beachim*, 7 Ch. D. 848; *Saunders* v. *Sun Co.*, [1894] 1 Ch. 537; *Manchester Brewery Co.* v. *North Cheshire, &c. Co.*, [1898] 1 Ch. 539.

[4] *E.g.*, "The Baker Street Bazaar"; *Boulnois* v. *Peake*, 13 Ch. D. 513, n.; and see *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512.

[5] As "Singer Sewing Machines"; *Singer Co.* v. *Loog*, *sup.*; *Birmingham Co.* v. *Powell*, [1897] A. C. 710.

[6] *Singer Co.* v. *Loog*, *sup.*, p. 38, per Lord Watson.

[7] *Levy* v. *Walker*, 10 Ch. D. 436.

[8] *Ante*, p. 203.

[9] *Ainsworth* v. *Walmisley*, 1 Eq. 524 (unless plaintiff claims damages); *Turton* v. *Turton*, 42 Ch. D. 128, 138, per Lord Esher, M.R. See *ante*, pp. 203, 204.

[10] That it is a mere question of fact and not of the defendant's intention, see *Glenny* v. *Smith*, 2 Dr. & Sm. 476, 480; *Hookham* v. *Pottage*, 8 Ch. 91; *Singer Co.* v. *Wilson*, 3 App. Cas. 376, 396; *Singer Co.* v. *Loog*, *sup.*, p. 38, per Lord Watson.

[11] *Braham* v. *Beachim*, 7 Ch. D. 848; *Manchester Brewery Co.* v. *North Cheshire Co.*, [1898] 1 Ch. 539.

would be the result, it would not be honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest."[1] If the natural consequence of the use by the defendant of the name adopted by him is that his goods will be taken to be those of the plaintiff, and he continues that user after notice of the plaintiff's right to the name, the Court holds the user to be wrongful and in a certain sense "fraudulent."[2]

Use of a man's own name.

It should be added that a man has a right to trade under his own name, even though the effect may be to injure a rival trader who happens to bear the same name,[3] provided he does so *bonâ fide;* but he must not use his own name in such a manner as to represent that his business is that of a rival trader of the same name.[4]

Whether the right to the exclusive use of a trade name can be properly called "property" appears to be still a moot point;[5] but it is perhaps rather a matter of verbal nicety than of practical importance, the substantial ground of the jurisdiction and the principles on which the Court acts being well ascertained.[6]

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[1] Per James, L.J., *Hendriks* v. *Montagu*, 17 Ch. D. 638.

[2] *Singer Co.* v. *Loog*, 18 Ch. D. 417, per Cotton, L.J.; *Turton* v. *Turton*, 42 Ch. D. 128, 140, per Cotton, L.J.

[3] See *ante*, p. 202.

[4] *Fullwood* v. *Fullwood*, 9 Ch. D. 176.

[5] See per Lord Blackburn, in *Singer Co.* v. *Loog*, 8 App. Cas. 32, 33. See also Wood, V.-C., in *Ainsworth* v. *Walmisley*, 1 Eq. 518, 524; James, L.J., in *Singer Co.* v. *Loog*, 18 Ch. D. 412; and *Walker* v. *Emmott*, 54 L. J. Ch. 1059.

[6] See per Lord Herschell, in *Montgomery* v. *Thompson*, [1891] A. C. 217, and in *Reddaway* v. *Banham*, [1896] A. C. 209. See *ante*, p. 202.

CHAPTER XIV.

PATENTS.

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Letters patent.

THE term "Letters Patent"[1] in the widest sense denotes grants made by the Crown of some right or privilege, as, for example, grants of lands, titles of honour, or offices; *e.g.*, the office of one of Her Majesty's counsel.

But by "Patents" in modern times we generally understand grants by the Crown to inventors of the sole and exclusive[2] right to "use, exercise, and vend" their inventions within the United Kingdom and the Isle of Man.[3]

Monopolies.

In ancient times the Crown asserted a prerogative right to make grants of monopolies. Coke describes a monopoly as being "an institution or allowance by the King by his grant, commission, or otherwise, to any person or persons, bodies politique or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade."[4] But, at common law, no grant of a monopoly was valid in respect of articles in common use, or if it purported to give the sole right to exercise a known occupation;[5] for a patentee or grantee must be the inventor, or at least the introducer into the realm,[6] of the

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[1] *I.e.*, *Literæ Patentes*, open letters, so-called, says Blackstone (2 Bl. 346), because "they are not sealed up but exposed to open view with the great seal pendant at the bottom, and are usually directed or addressed by the King to all his subjects at large." See the Form of Letters Patent for Inventions, *post*, Appendix. By 46 & 47 Vict. c. 57, s. 12, the seal of the Patent Office (see s. 84) was substituted for the Great Seal.

[2] *Steers* v. *Rogers*, [1893] A. C. 235.

[3] A patent is a "franchise" within the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56, and therefore a County Court has no jurisdiction to try an action for the infringement of a patent where the validity of the patent is in dispute: *Reg.* v. *Halifax*, [1891] 1 Q. B. 793; 2 *ib.* 263.

[4] Coke, 3rd Instit. 181. See, as to the history of monopolies, Edmunds on Patents, Ch. II.

[5] *Case of Monopolies*, 11 Rep. 84 b.

[6] See *Darcy* v. *Allin* (44 Eliz.), Noy's Reports, 178, 182; per Jessel, M.R., in *Marsden* v. *Saville Co.*, 3 Ex. D. 206. Cf. *Clothworkers of Ipswich Case*, Godb. 252.

thing which is the subject of the patent or grant; though under the Act of 1883 the grant may be made to others jointly with him.[1]

Statute of Monopolies—21 Jac. 1, c. 3.

After great complaints, in the reigns of Elizabeth and James I., of the abuse of the prerogative by the granting of illegal monopolies, the law was, in 1624, declared and defined by the Statute of Monopolies, 21 Jac. 1, c. 3, which, after declaring that monopolies[2] are "altogether contrary to the laws of this realm" and shall be utterly void, proceeds to except patents for the term of fourteen years or under, granted for new inventions.[3] This exception is contained in the following saving clause:—

> S. 6. "Any declaration before mentioned shall not extend to any letters patent and grants of privilege, for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor or inventors of such manufactures, which others, at the time of making such letters patent and grants, shall not use: so as also they be not contrary to the law, nor mischievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be if this Act had never been made, and of none other."[4]

The validity of a patent for an invention is to be ascertained by reference to the terms of the above section of the 21 Jac. 1, c. 3; and it will be observed that the section requires (*inter alia*) that:—

(1) The subject-matter of the patent must be a "manufacture," and must be "new" within the realm.[5]

(2) The patentee must be the "true and first inventor."

(3) The invention must be one not already in use within the realm.

Manufacture.

(1) As regards the legitimate subject-matter of a patent, the word "manufacture," as used in the statute, is taken to mean a vendible article produced by the art and hand of man.

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[1] See p. 226.

[2] There described as privileges of "the sole buying, selling, making, working, or using anything within this realm."

[3] Such grants were valid at common law; 3rd Instit. 184.

[4] See Bell's Principles of the Law of Scotland, § 1349 (the law of Scotland as to patents is the same as that of England: *ib.*).

[5] As to what is meant by "the realm," see *Rolls* v. *Isaacs*, 19 Ch. D. 268.

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New substance.
New mechanism.
New process.

"The word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed, either in the making of some previously known article, or in some other useful purpose, as a stocking frame, or a steam engine for raising water from mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind."[1]

No patent for a principle.

But "no merely philosophical or abstract principle can answer to the word 'manufactures.' For instance, supposing a person discovered that three angles of a triangle are equal to two right angles, that is an abstract discovery and would not be the subject of a patent."[2] "Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is required to satisfy this word."[3] The patent must be for the vendible matter and not for the principle.[4] The true foundation of all patents is the manufacture itself;[5] but the thing patented may be either a new substance, or a new mechanism, or a new method or process[6] whereby articles can be produced more quickly and cheaply, though neither the thing produced nor the machinery producing it be novel; for "no novelty is required as to the object; the novelty may be in the means for effecting the object, whether old or new."[7] Although there can be no valid patent for a mere principle *per se*, yet where a principle is so embodied in and connected with corporeal substances as by a practical method or process to produce new results and effects in any art, trade, or manual occupation, there may be a valid patent for the combination of the new principle with the practical method of applying it.[8]

"Invention," not discovery.

An invention is not the same thing as a discovery; if a man

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[1] Per Abbott, C.J., *The King* v. *Wheeler*, 2 B. & Ald. 349.

[2] *Young* v. *Rosenthal*, 1 R. P. C. 31.

[3] *The King* v. *Wheeler*, 2 B. & Ald. 350; 20 R. R. 465.

[4] Per Heath, J., *Boulton* v. *Bull*, 2 H. Bl. 482; 3 R. R. 439.

[5] Per Buller, J., *ib.* 486.

[6] See as to new processes, *Crane* v. *Price*, 4 M. & Gr. 580; Edmunds on Patents, 24; *Crossley* v. *Potter*, Macr. Pat. Cas. 240.

[7] Per Wood, V.-C., *Curtis* v. *Platt*, 3 Ch. D. 136 (note).

[8] See per Eyre, C.J., in *Boulton* v. *Bull*, 2 H. Bl. 492, 494, 495; 3 R. R.

does nothing more than discover that a known machine can produce effects which it was not known that it could produce, his discovery, however great and useful, is not a patentable invention. Some addition must be made to previously known inventions, and either a new and useful thing or result must be produced, or a new and useful method of producing an old thing or result. But the discovery how to use a known thing for a useful purpose for which it has never before been used may be an "invention" if there is novelty in the mode of using it as distinguished from novelty of purpose, or if any new modification of the thing, or any new appliance, is necessary for using it for its new purpose.[1]

Combination.

A combination may be the subject of a valid patent if the combination is new and useful, though each of the parts which enter into it be old,[2] and the patent gives protection for each part that is new and material for the process, but not for a part which would not itself have been patentable.[3]

True and first inventor.

(2) A person, who in a popular sense was not the true and first inventor, may yet be "the true and first inventor" in a legal sense; for instance, he may have been the first to have imported some one else's invention from abroad; or he may have been the first to make known an invention which others had also discovered but had not made known to the public. In *Plimpton* v. *Malcolmson* Jessel, M.R., said:—[4]

"Shortly after the passing of the statute, the question arose whether a man could be called a first and true inventor who, in the popular sense, had never invented anything, but who, having learned abroad (that is, out of the realm, in a foreign country, because it has been decided that Scotland is within the realm for this purpose) that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided, and now, therefore, is the legal sense and meaning of the statute, that he was a first and true inventor within the statute, if the invention, being in other respects novel and useful, was not previously known in this country—'known' being used in that particular sense, as being part of what had been called the common or public knowledge

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465; *Otto* v. *Linford*, 46 L. T. 35; per Pearson, J., *Badische Anilin* v. *Levinstein*, 24 Ch. D. 171, 172.

[1] *Lane-Fox* v. *Kensington Co.*, [1892] 3 Ch. 424, 426, per Lindley, L.J.

[2] Per Lord Campbell, C.J., *Lister* v. *Leather*, 8 E. & B. 1016. See *Clark* v. *Adie*, 2 App. Cas. 315.

[3] Per James, V.-C., *Parkes* v. *Stevens*, 8 Eq. 367, 368.

[4] *Plimpton* v. *Malcolmson*, 3 Ch. D. 555.

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of the country. That was the first thing. Then there was a second thing. Suppose there were two people, actual inventors in this country, who invented the same thing simultaneously, could either be said to be the first and true inventor? It was decided that the man who first took out the patent was the first and true inventor. Then there was another point. If the man who took out the patent was not, in popular language, the first and true inventor, because somebody had invented it before, but had not taken out a patent for it, would he still, in law, be the first and true inventor? It was decided he would, provided the invention of the first inventor had been kept secret, or, without being actually kept secret, had not been made known in such a way as to become a part of the common knowledge, or of the public stock of information. Therefore, in that case also, there was a person who was legally the first and true inventor, although, in common language, he was not, because one or more people had invented it before him, but had not sufficiently disclosed it."

Prior discovery not patented or published.

This rule, however, that a communication from abroad enables a person to take out a patent, is anomalous; and a communication made in England by one British subject to another British subject does not make the recipient the "true and first inventor."[1]

Letters patent may be granted to a foreigner resident abroad for an invention communicated to him by another foreigner also resident abroad.[2]

Anticipation —prior user or publication.

(3) "The consideration for a patent is the communication to the public of a process that is new."[3]

It is therefore often set up by way of defence to an action for infringement of a patent, that the alleged invention, the subject-matter of the patent, has been made known, or has been anticipated by use within the realm. "If the public once becomes possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the true or first inventor himself, or any other person, for the public cannot be deprived of the right to use the invention, and a patentee of the invention could not give any consideration to the public for the grant, the public already possessing everything that he could give."[4]

Prior user or publication.

"It is not necessary that the invention should be used by the public as well as known to the public. If the invention and the mode in which it can be used has been made known to the public

[1] *Marsden* v. *Saville Co.*, 3 Ex. D. 203. See *Lewis* v. *Marling*, 10 B. & C. 22; 34 R. R. 313.

[2] Per Lord Cairns, C., *Re Wirth*, 12 Ch. D. 303; Act of 1883, s. 4 (1).

[3] Per Lord Blackburn, *Patterson* v. *Gas Light Co.*, 3 App. Cas. 244.

[4] Hindmarch on Patents, 33; approved, as a correct statement of the law, per Lord Blackburn, 3 App. Cas. 244.

by a description in a work which has been publicly circulated, or in a specification (*post*, p. 227) duly inrolled, it avoids the patent, though it is not shown that it ever was actually put in use."[1]

There must be either some prior use in this country, or some prior publication in this country of an intelligible description of the invention[2] which has become known here;[3] and the *onus* is on the patentee to show that a prior publication did not become so known; for no evidence is necessary to show that the publication was in fact read or referred to; but, if proof is given that it was not sold or circulated, the publication would not be fatal to the patent.[4] Moreover, the information as to the alleged invention given by the prior publication must be equal to that given by the subsequent patent; it must be "such that a person of ordinary knowledge of the subject (*i.e.*, an expert) would at once perceive, understand, and be able practically to apply the discovery without the necessity of making further experiments and gaining further information before the invention can be made useful."[5]

Utility.

To be the subject of a valid patent an invention must be not only novel but useful, though the Statute of Monopolies does not mention utility.[6] But it is not necessary to show that the invention will be commercially successful;[6] and a small amount of utility is sufficient to support a patent.[7] "Utility" in this connection does not mean abstract utility, but "an invention better than the preceding knowledge of the trade as to a particular fabric."[8]

Patents, &c. Act, 1883.

The grant and protection of a patent are now regulated by the Patents, Designs and Trade Marks Act, 1883,[9] which was passed to

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[1] Per Lord Blackburn, 3 App. Cas. 244, 245, and per Blackburn, J., *Betts* v. *Menzies*, 10 H. L. C. 142. But the antecedent specification must disclose a practicable mode of producing the result which is the effect of the subsequent discovery; per Lord Westbury, C., *Betts* v. *Menzies*, 10 H. L. C. 154.

[2] Per Cotton and Lindley, L.JJ., *Harris* v. *Rothwell*, 35 Ch. D. 427.

[3] See as to what extent of knowledge is sufficient, per Jessel, M.R., *Plimpton* v. *Malcolmson*, 3 Ch. D. 556.

[4] Per Cotton and Lindley, L.JJ., *Harris* v. *Rothwell*, 35 Ch. D. 428. The publication may be in a foreign language; *ib.* p. 429. Cf. *Pickard* v. *Prescott*, 9 R. P. C. 195.

[5] Per Lord Westbury, C., *Hill* v. *Evans*, 4 De G. F. & J. 300; *Philpott* v. *Hanbury*, 2 R. P. C. 43; *Anglo-American Brush Co.* v. *King*, [1892] A. C. 378.

[6] Per Lord Halsbury, C., *Badische Anilin* v. *Levinstein*, 12 App. Cas. 712.

[7] Per Jessel, M.R., *Plimpton* v. *Malcolmson*, 3 Ch. D. 582.

[8] Per Grove, J., *Young* v. *Rosenthal*, 1 R. P. C. 34; *Lane-Fox* v. *Kensington Co.*, [1892] 3 Ch. 424. See further as to utility, Edmunds on Patents, 100 *et seq.*; Frost on Patents, 125 *et seq.*; Lawson on Patents, 206.

[9] 46 & 47 Vict. c. 57. The earlier statutes were the Acts of 1835 (5 & 6 Will. 4, c. 83); 1852 (15 & 16 Vict. c. 83); and 1853 (16 Vict. c. 5).

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amend and consolidate the law relating to patents for inventions; by the general rules of the Board of Trade thereunder;[1] and by the amending Acts of 1885, 1886, and 1888.[2] These Acts, subject to certain special provisions, apply also to Scotland and Ireland,[3] and to the Isle of Man.[4]

Definitions of "patent"—"patentee"—"invention."

In the above Acts, "patent" means letters patent for an invention; "patentee" means the person for the time being entitled to the patent; and "invention" means "any manner of new manufacture the subject of letters patent and grant of privilege within sect. 6 of the Statute of Monopolies" (*supra*, p. 221), "and includes an alleged invention."[5]

The Acts are not to take away, abridge, or prejudicially affect, the prerogative of the Crown in relation to the granting of letters patent or withholding a grant.[6]

Who may apply for patent.

Any person (which includes a body corporate[7]), whether a British subject or not, may apply for a patent;[8] and two or more persons may apply and a patent be granted to them jointly, although some or one only be the true inventors or inventor.[9]

Joint patentees.

Formerly they must have been joint inventors. There is no implied contract that no one of the co-patentees shall use the invention without the consent of the others, or, if he does, that he shall use it for their joint benefit.[10] If the inventor dies without applying for a patent, application may (within six months from his death) be made by, and a patent granted to, his "legal representative."[11]

Application.

The application must be in the prescribed form, and must be left at, or sent by post to, the Patent Office.[12] It must contain a declaration[13] to the effect that the applicant, or in a joint application one or more of the applicants, claims or claim to be the true and first inventor or inventors.[14]

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[1] 46 & 47 Vict. c. 57, s. 101.

[2] 48 & 49 Vict. c. 63; 49 & 50 Vict. c. 37; 51 & 52 Vict. c. 50.

[3] Act of 1883, ss. 107—111. See *Kinahan* v. *Kinahan*, 45 Ch. D. 78.

[4] S. 112.

[5] S. 46.

[6] S. 116.

[7] S. 117.

[8] S. 4 (1).

[9] S. 4 (2); and Act of 1885, s. 5.

[10] *Mathers* v. *Green*, 1 Ch. 29; Goodeve's P. C. 298. See *Hancock* v. *Bewley*, Johns. 601; *Steers* v. *Rogers*, [1892] 2 Ch. 13.

[11] Act of 1883, s. 34. Before this Act the legal personal representative could not take out a patent; *Marsden* v. *Saville Co.*, 3 Ex. D. 203.

[12] *Ib.* ss. 5 (1), and as to the Patent Office, s. 82 (1).

[13] The declaration may be a statutory declaration under 5 & 6 Will. 4, c. 62, or not, as may be from time to time prescribed; Act of 1885, s. 2.

[14] Act of 1883, ss. 5 (2), 99; Act of 1885, s. 2.

"True and first inventor."

The Act does not attempt to define who is "the true and first inventor;" to ascertain the meaning of the expression, recourse must still be had to the numerous decisions upon the Statute of Monopolies.[1]

Publication at exhibitions.

The exhibition of an invention at, or the publication of a description during, certain exhibitions do not prejudice the right of the inventor to apply for a patent, provided that he has given the proper notice of his intention to exhibit, and applies for a patent within six months of the opening of the exhibition.[2] By Order in Council this protection may be extended to exhibitions abroad, and the exhibitor be relieved from the condition as to notice.[3]

Specification.

It is part of the consideration for the grant of a patent that the patentee shall secure to the public the benefit of his discovery, so that at the expiration of the patent others may be able to work or make the manufacture of which the patentee was the inventor.[4]

The patentee has, therefore, ever since the time of Queen Anne,[5] been required to furnish a description—called a "specification"—of the thing to be done and the manner of doing it, in such a way as to enable skilled persons to adopt the invention and make the manufacture. The object of requiring a specification is to enable persons of reasonable intelligence and skill in the subject-matter to tell from the inspection of the specification itself what the invention was for which the patent was granted.[6] The specification must be such as, if fairly followed by a competent workman without invention or addition, would produce the thing for which the patent is taken out.[7] It is supposed to be addressed to a practical workman who brings the ordinary degree of knowledge and capacity to the subject.[8]

Provisional and complete specifications.

Since the Act of 1852[9] it has been the practice to furnish two specifications, first, a preliminary or "provisional" specification, which describes the *nature* of the invention, with the object of protecting an inventor until the filing of a second specification,

[1] 21 Jac. 1, c. 3, *ante*, p. 221.

[2] Act of 1883, s. 39.

[3] Act of 1886, s. 3.

[4] *Hornblower* v. *Boulton*, 8 T. R. 100, 103; 3 R. R. 439.

[5] Per Lord Blackburn, *Bailey* v. *Roberton*, 3 App. Cas. 1074.

[6] *Foxwell* v. *Bostock*, 4 De G. J. & S. 312, per Lord Westbury, C.

[7] Per Parke, B., *Neilson* v. *Harford*, 1 Webs. P. C. 66, n.

[8] Per Parke, B., *Neilson* v. *Harford*, 1 Webs. P. C. 314. See per Jessel, M.R., *Plimpton* v. *Malcolmson*, 3 Ch. D. 568, 569; *Badische Anilin* v. *Levinstein*, 12 App. Cas. 710; *Lane-Fox* v. *Kensington Co.*, [1892] 3 Ch. 424.

[9] 15 & 16 Vict. c. 83.

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called the "final" or "complete" specification, which must not only describe the nature of the invention, but must also show "in what manner it is to be performed."[1]

"The object of requiring the patentee to state" (by the provisional specification) "the nature of his invention is to let the public know what is the prohibited ground, and what they are not to do, what the patentee has got his grant for, which gives him a monopoly for fourteen years. The object of requiring the patentee to describe" (by the complete specification) "the manner of carrying the invention into practical effect is to prevent the patentees from keeping to themselves the means of performing their inventions, so that after the monopoly for fourteen years they could still use the thing, keeping secret the mode in which they did it."[2]

Disconformity.

It is an essential condition of a good patent that the provisional specification should describe the true nature of the invention, and that the invention there described should be the same as that claimed in the complete specification; and non-compliance with this condition is a defence to an action for infringement, and is a ground for revocation of the patent.[3]

Specification under the Act of 1883.

The Act of 1883, therefore, requires that an application for a patent shall be accompanied by a "specification," which may be either "provisional" or "complete."[4] A provisional specification must describe the nature of the invention, and be accompanied by drawings if required;[5] a complete specification must particularly describe and ascertain the nature of the invention, and in what manner it is to be performed, and must be accompanied by drawings, if required, or refer to those which accompanied the provisional specification.[6] Every specification must commence with the title of the invention, and a complete specification must end with a distinct statement of the invention claimed;[7] but this provision is directory only, and non-compliance with it does not invalidate the patent.[8] The complete specification, if not left with the application, may be left at any time within nine months or, with leave,

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[1] *Stoner* v. *Todd*, 4 Ch. D. 58, per Jessel, M.R. See, as to the difference between provisional and complete specifications, the authorities cited by Fry, J., in *United Telephone Co.* v. *Harrison*, 21 Ch. D. 743 *et seq.*; *Siddell* v. *Vickers*, 39 Ch. D. 92; 15 App. Cas. 496.

[2] Per Grove, J., *Philpott* v. *Hanbury*, 2 R. P. C. 38.

[3] *Vickers* v. *Siddell*, 15 App. Cas. 496; *Nuttall* v. *Hargreaves*, [1892] 1 Ch. 23.

[4] Act of 1883, s. 5 (2).

[5] S. 5 (3).

[6] S. 5 (4); Act of 1886, s. 2.

[7] S. 5 (5).

[8] *Vickers* v. *Siddell*, 15 App. Cas. 496.

within a further period of one month,[1] from the date of application; and unless it is left within that time, the application is deemed to be abandoned.[2] Formerly the specification was completed subsequently to the grant of the patent. It has been provided that, when an application has been abandoned, no specification or drawings shall be open to public inspection or be published by the Comptroller.[3]

Comptroller—examiner—law officer.

The officer under whose immediate control the Patent Office is placed is called the "Comptroller-General of Patents, Designs, and Trade Marks," and he acts under the superintendence and direction of the Board of Trade, by whom he is appointed.[4] He is to refer every application to an examiner, who is also an officer appointed by the Board of Trade,[5] whose duty it is to ascertain and report to the Comptroller whether the nature of the invention has been fairly described, and the application, specification, and drawings (if any) have been prepared in the prescribed manner, and the title sufficiently indicates the subject-matter of the invention;[6] upon the report of the examiner the Comptroller may, after opportunity to the applicant of being heard,[7] refuse to accept the application or require the application, specification, or drawings to be amended, subject to an appeal to the law officer,[8] that is, the Attorney-General or Solicitor-General.[9]

Complete specification.

Where a complete specification is left, after a provisional specification, the Comptroller is to refer both specifications to an examiner to ascertain whether the complete specification has been prepared in the prescribed manner, and whether the invention particularly described in the complete specification is substantially the same as that which is described in the provisional specification; upon the report of the examiner the Comptroller may (after opportunity to the applicant of being heard[10]) refuse to accept the complete specification unless amended, subject to an appeal to the law officer.[11] Unless a complete specification is accepted within twelve months (or, with leave, within a further period of three months[12]) from the date of application, then

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[1] Act of 1885, s. 3.
[2] Act of 1883, s. 8.
[3] Act of 1885, s. 4.
[4] Act of 1883, ss. 82, 83.
[5] S. 83.
[6] S. 6.
[7] S. 94.
[8] Act of 1888, s. 2.
[9] Act of 1883, s. 117.
[10] S. 94.
[11] S. 9 (1), (2), (3).
[12] Act of 1885, s. 3.

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(unless an appeal have been lodged) the application becomes void at the expiration of the twelve months,[1] or of the extended time.[2]

Abandoned or void application.

As in the case of an abandoned application,[3] so in the case of one becoming void, no specification or drawings are to be open to public inspection or published by the Comptroller.[4] In no case are the reports of examiners to be published or open to public inspection, or liable to production in legal proceedings "unless the Court or officer having power to order discovery in such legal proceedings shall certify that such production or inspection is necessary in the interests of justice and ought to be allowed."[5]

Advertisements.

On the acceptance of the complete specification the Comptroller is to advertise the acceptance, and the application and specification or specifications with the drawings (if any) are to be open to inspection;[6] and provision is made for the issue of an official journal by the Comptroller,[7] and for a Patent Museum.[8]

Several applications in respect of same invention.

If, after an application has been made, but before the patent therein has been sealed, another application is made with a specification bearing the same or a similar title, the Comptroller may, on the request of the second applicant, or of his legal representative, within two months of the grant of a patent on the first application, either decline to proceed with the second application or allow the surrender of the patent, if any, granted thereon.[9] It is also provided that in case of more than one application for a patent for the same invention, the sealing of a patent on one application shall not prevent the sealing of a patent on an earlier application.[10]

Amendment of specification.

The Comptroller, subject to an appeal to the law officer, may permit an amendment from time to time in a specification (including the drawings) by way of disclaimer, correction, or explanation, by an applicant or a patentee, provided that he do not thereby claim an invention substantially larger or different, and that no action for infringement or proceeding for revocation

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[1] Act of 1883, s. 9 (4).
[2] Act of 1885, s. 3.
[3] *Ante*, p. 220.
[4] Act of 1885, s. 4.
[5] Act of 1883, s. 9 (5), amended by the Act of 1888, s. 3.
[6] S. 10.
[7] S. 40.
[8] S. 41.
[9] Act of 1888, s. 2 (5), repealing s. 7 of the Act of 1883.
[10] Act of 1883, s. 13.

of the patent is pending.[1] In an action for infringement, or proceeding for revocation, the patentee may, with the leave of the Court or a judge, apply at the Patent Office for leave to amend by way of disclaimer, and in such case the hearing of the action may in the meantime be postponed.[2] In case of any amendment, no damages will be recoverable in respect of use of the invention prior thereto, unless the patentee establishes that his original claim was framed in good faith and with reasonable skill and knowledge.[3]

Opposition to grant.

Any person may, within two months from the date of advertisement of the acceptance of a complete specification, give notice at the Patent Office of opposition to the grant of a patent on the following grounds,—(1) that the applicant has obtained the invention from him, or from a person of whom he is the legal representative; or (2) that the invention has been patented in this country on an application of prior date; or (3) that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification.[4] After the two months the Comptroller is to decide on the case subject to an appeal to the law officer, who may call in the assistance of an expert.[5]

Grant of patent.

If there is no opposition, or in case of opposition if the determination is in favour of the grant, the Comptroller is to cause a patent to be sealed.[6]

The patent must be for one invention only, but may contain more than one claim; but no objection may be taken in any action or proceeding on the ground that the patent comprises more than one invention.[7] The patent is to be sealed as soon as may be, and not after fifteen months from the date of application (unless the time for leaving a complete specification has been

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[1] S. 18, amended by s. 5 of the Act of 1888. See *Re Van Gelder*, 6 R. P. C. 22. As to "pending" actions, see *Cropper* v. *Smith* (No. 2), 28 Ch. D. 148.

[2] S. 19. See *Fusee Co.* v. *Bryant*, 34 Ch. D. 458; *Bray* v. *Gardiner*, *ib.* 668; *Re Armstrong*, 14 R. P. C. 747; *Re Dellwick*, [1896] 2 Ch. 705.

[3] S. 20.

[4] S. 11 (1), as amended by s. 4 of the Act of 1888.

[5] S. 11 (2), (3), (4).

[6] S. 12 (1), (2).

[7] S. 33. See form of patent in 1st Schedule of the Act.

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extended, in which case a further period of four months is allowed[1]), except in the following cases:—(1) where the sealing is delayed by an appeal to the law officer, or by opposition to the grant, then it may be sealed at such time as the law officer may direct; and (2) if the applicant dies before the expiration of the fifteen months, the patent may be granted to his "legal representative" and sealed at any time within twelve months after the applicant's death.[2]

Date of grant.

Every patent is to be dated and sealed as of the day of the application; but no proceedings can be taken in respect of an infringement committed before the publication of the complete specification.[3]

Provisional protection.

Where an application has been accepted, the invention may, between the date of application and of sealing, be used and published without prejudice to the patent to be granted; such protection from the consequences of use and publication is called "provisional protection."[4] The effect of this is to protect the inventor against the consequences of his own publication, but not to give him any rights as against the public until his patent is sealed, and even then the patent will not relate back to acts done in the interval.[5]

Protection by acceptance of complete specification.

After the acceptance of a complete specification, until the date of sealing the patent or expiration of time for sealing, the applicant has the like privileges and rights as if a patent had been sealed on the date of acceptance of the complete specification; except that he cannot institute proceedings for infringement until a patent has been granted to him.[6]

Refusal to grant patent.

The Comptroller may refuse to grant a patent for an invention, of which the use would, in his opinion, be contrary to law or morality.[7]

Loss or destruction of patent.

If a patent is lost or destroyed, or its non-production is accounted for to the satisfaction of the Comptroller, he may at any time cause a duplicate to be sealed.[8]

Extent and duration of patent.

The patent, when sealed, has effect throughout the United Kingdom and the Isle of Man.[9] The term limited in the patent for its duration is fourteen years from its date; but the patent

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[1] Act of 1885, s. 3.
[2] Act of 1883, s. 12 (3).
[3] S. 13.
[4] S. 14.
[5] Per Lord Hatherley, C., *Exp. Bates*, 4 Ch. 578.
[6] S. 15.
[7] S. 86.
[8] S. 37.
[9] S. 16.

will cease on failure by the patentee to make the prescribed payments within the prescribed times, unless the time has been enlarged by the Comptroller, when satisfied that the failure to pay was attributable to accident, mistake, or inadvertence.[1]

Extension of term of patent.

A patent may be extended on petition to Her Majesty in Council (which must be presented at least six months before the time limited for the expiration of the patent) for a further term not exceeding seven, or, in exceptional cases, fourteen years, if the Judicial Committee, having regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case, report that the patentee has been inadequately remunerated by his patent; or a new patent may be granted for the term therein mentioned and containing any restrictions, conditions, and provisions that the Judicial Committee may think fit.[2]

The petitioner must furnish full and proper accounts of his profits for the information of the Court.[3] Where an invention has not been brought into use during the term of the patent, but such non-user is satisfactorily accounted for, an extension may be granted.[4]

Extension to assignee.

An assignee can obtain the extension of a patent; but an extension will not be granted to an assignee unless the inventor himself will benefit by the extension, and would have been in a position to claim an extension himself.[5]

Crown and officers of the Crown.

Before the Act of 1883 the Crown had a right to use a patented invention without compensation to the patentee.[6] But now, all patents granted since 1883[7] have the like effect against Her Majesty and her heirs and successors as they have against a subject; but the officers or authorities administering any department of the service of the Crown may, by themselves, their agents, contractors, or others, use the invention for the services of the Crown on terms to be, before or after the use thereof, agreed on, with the approval of the Treasury, between them and the patentee, or in default of such agreement on such terms as may be settled by the

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[1] Ss. 17, 24.

[2] S. 25.

[3] *Re Newton*, 9 App. Cas. 592; *Re Yates*, 12 *ib.* 147; *Re Lake*, [1891] A. C. 240.

[4] *Re Southby*, [1891] A. C. 432.

[5] *Re Bower-Barff*, [1895] A. C. 675; *Re Hopkinson*, [1897] A. C. 249; Act of 1883, s. 46.

[6] *Dixon* v. *London Co.*, 1 App. Cas. 632, 659.

[7] Act of 1883, ss. 3, 45 (2).

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Treasury.[1] The Act contains provisions whereby the Government may acquire and keep secret any inventions relating to instruments or munitions of war.[2]

User on foreign vessels in British waters.

A patent is not to prevent the use of an invention on foreign vessels in British waters if not used for or in connection with the manufacture or preparation of anything to be sold in or exported from the United Kingdom or Isle of Man; provided that a similar indulgence is accorded by the foreign state to the use of inventions in British vessels while in the waters within the jurisdiction of such state.[3]

Compulsory licences.

If, on the petition of a person interested, it is proved to the Board of Trade that, by reason of the default of a patentee to grant licences on reasonable terms, (1) the patent is not being worked in the United Kingdom, or (2) the reasonable requirements of the public with respect to the invention cannot be supplied, or (3) any person is prevented from working or using to the best advantage an invention of which he is possessed, then the Board may compel the patentee to grant licences on such terms as the Board may deem just.[4]

Revocation.

The old complicated proceeding to repeal a patent by *scire facias*[5] is abolished, and in place thereof revocation of a patent may be obtained on petition to the High Court; but every ground on which a patent might formerly be repealed by *scire facias* is still available by way of defence to an action of infringement, and is also a ground of revocation.[6] A petition of revocation may be presented[7] by the Attorney-General or any person authorized by him or by—

(1.) Any person alleging that the patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims:

(2.) Any person alleging that he or any person under or through whom he claims, was the true inventor of any invention included in the claim of the patentee:

(3.) Any person alleging that he or any person under or through whom he claims an interest in any trade, business, or manufacture, had publicly manufactured, used, or sold, within this realm, before the date of the patent, anything claimed by the patentee as his invention.

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[1] S. 27.
[2] S. 44.
[3] S. 43.
[4] Ss. 22, 45 (2).
[5] See *ante*, p. 152.
[6] S. 26 (1), (2), (3).
[7] S. 26 (4).

When a patent has been revoked on the ground of fraud, upon an application by the true inventor, a patent may be granted to him in lieu of, and bearing the same date as the date of revocation of, the revoked patent; but it will cease on the expiration of the term for which the revoked patent was granted.[1] A patent granted to the true and first inventor will not be invalidated by an application in fraud of him, or by provisional protection obtained thereon, or by any use or publication during such protection.[2]

Assignment.

A patentee may assign his patent for any place in or part of the United Kingdom or Isle of Man, as effectually as if it had been granted to extend to that place or part only.[3] This does not limit his power of absolute assignment. The person for the time being entered in the register as proprietor of a patent has, subject to any rights appearing from such register to be vested in any other person, power absolutely to assign, grant licences as to, or otherwise deal with, the same.[4] Any equities, however, in respect of such patent may be enforced in like manner as in respect of any other personal property.[5] The legal mode of assignment is by deed, but an equitable assignment may be registered.[6] Notice of a trust, however, cannot be entered on the register or be received by the Comptroller.[7]

Equitable rights.

Registers.

In the Register of Patents at the Patent Office are to be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences, of amendments, extensions, and revocations, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed, and the register will be *primâ facie* evidence of any matters by the Act directed or authorised to be inserted therein.[8] Copies of deeds, licences, and any other documents affecting proprietorship, must be supplied to the Comptroller for filing in the Patent Office.[9] The register is to be open to the inspection of the public, and certified copies of any entry may be obtained.[10] Certified copies or abstracts of or from patents and

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[1] S. 26 (8).

[2] S. 35.

[3] S. 36.

[4] S. 87, as amended by s. 21 of the Act of 1888; s. 23.

[5] S. 87. See *New Ixion Co.* v. *Spilsbury*, [1898] 2 Ch. 137, 484.

[6] *Re Casey*, [1892] 1 Ch. 104.

[7] S. 85.

[8] S. 23 (1), (2).

[9] S. 23 (3).

[10] S. 88, as amended by s. 22 of the Act of 1888.

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other documents in the Patent Office, and of or from registers and other books kept therein, are to be received in evidence without further proof or production of the originals.[1] The High Court may, on the application of any person aggrieved, order the register to be rectified,[2] and the Comptroller may correct a clerical error.[3]

Threats of proceedings by patentee.

Formerly a patentee who issued notices against the sale or purchase of certain articles, alleging infringements of his patent and threatening proceedings, was not liable to an action for damages by the vendor or for an injunction, if he acted *bonâ fide;* on the ground that an action for slander of title would not lie unless the statements were not only untrue, but were made without reasonable and probable cause, that is *malâ fide*.[4] But now the Act of 1883[5] provides that:—

> Where any person claiming to be the patentee[6] of an invention, by circulars, advertisements, or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats. Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.

It must be proved by the person aggrieved, as a condition precedent to obtaining an injunction, that there has not in fact been any infringement of the claimant's legal rights.[7] The person aggrieved may bring an action under this section whether the threats are addressed to himself or are intimated to a third person, and whether the occasion was privileged or not.[8]

Falsely representing articles to be patented.

Any person representing that any article sold by him is a patented article, when no patent has been granted for it, is made liable for every offence on summary conviction to a fine not exceeding 5*l*.[9]

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[1] S. 89.

[2] S. 90, as amended by s. 23 of the Act of 1888.

[3] S. 91.

[4] *Halsey* v. *Brotherhood*, 19 Ch. D. 386.

[5] Act of 1883, s. 32. See *Kurtz* v. *Spence*, 36 Ch. D. 770.

[6] *Temler* v. *Stevenson*, 15 R. P. C. 24.

[7] *Barney* v. *United Telephone Co.*, 28 Ch. D. 394.

[8] *Challender* v. *Royle*, 36 Ch. D. 425; *Skirmer* v. *Shew*, [1893] 1 Ch. 413. See further on this section, *Johnson* v. *Edge*, [1892] 2 Ch. 1; *Temler* v. *Stevenson*, 15 R. P. C. 24.

[9] Act of 1883, s. 105.

Remedies for infringement.

The remedy of a patentee against an infringer is by action for an injunction to prevent future infringement and for damages or an account of profits in respect of past infringement; but he must elect whether to claim damages or profits, and cannot have both.[1]

A person abroad who sends by post goods to England which are an infringement of an English patent, in compliance with an order to so send the goods, is not liable as an infringer of the patent in England.[2]

Arrangements for the protection in this country of persons who have taken out patents in foreign countries or in British possessions are contained in the Act and are explained above (*ante*, p. 216).

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[1] *Neilson* v. *Betts*, L. R. 5 H. L. 1, 22; *De Vitré* v. *Betts*, L. R. 6 H. L. 319; see, as to the measure of damages, *United Horse Shoe Co.* v. *Stewart*, 13 App. Cas. 401; *American Braided Wire Co.* v. *Thomson*, 44 Ch. D. 274; and see the forms of judgment in Seton, 565 *et seq.*

[2] *Badische Anilin* v. *Basle Co.*, [1898] A. C. 200.

CHAPTER XV.

COPYRIGHT.

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Copyright, what is.

The term "copyright" was defined by Lord Mansfield as signifying "an incorporeal right to the *sole* printing and publishing of somewhat intellectual communicated by letters;" the right "to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression;" "it is detached from the manuscript, or any other physical existence whatsoever."[1]

It is "property."

Being an exclusive right *in rem* as against all the world, it is to be considered as "property" in the author, or his assigns.

Rights, (1) to prevent publication; (2) to prevent multiplying copies.

The rights of the author of a literary work are, (1) before publication, to publish his work or not, as he thinks fit, and to prevent anybody else from publishing it;[2] and (2) the right, after publication, of republishing and of restraining others from publishing it.[3] This latter right is true "copyright," *i.e.*, the right to prevent others from multiplying copies,[4] for until the work is published it is not open to be copied.

Two meanings of "copyright."

"The term 'copyright' may be understood in two different senses. The author of a literary composition which he commits to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself or for others. If he lends a copy to another, his right is not gone. . . . . The other sense of that word is the exclusive right of multiplying copies; the right of preventing all others from copying, by printing or otherwise, a literary work which the author has published. This must be carefully distinguished from the other sense of the word, ... and it would tend to keep our ideas clear if, instead of 'copyright,' it was called the exclusive right of printing a published work, that being the ordinary mode of multiplying copies."[5]

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[1] Per Lord Mansfield, C.J., *Millar* v. *Taylor*, 4 Burr. 2303, 2396.

[2] See *Prince Albert* v. *Strange*, 1 Mac. & G. 42.

[3] Per Maule, J., *Jefferys* v. *Boosey*, 4 H. L. C. 893.

[4] *Trade Auxiliary Co.* v. *Middlesbrough Assocn.*, 40 Ch. D. 430.

[5] Per Parke, B., *Jefferys* v. *Boosey*, 4 H. L. C. 919. See, per Lord St. Leonards, *ib.*, p. 978, as to this distinction.

An instance of the right to prevent publication of unpublished matter is to be found in the case of private letters; for the author of such a letter retains the general property in it, and can restrain the person to whom it is addressed, as well as all other persons, from publishing it.[1]

Right to prevent publication of letters.

It seems to be agreed that the author's right to prevent publication exists at common law:[2] but whether the right, after publication, to prevent multiplication of copies belonged to anyone at common law, apart from statute, is a question on which the highest authorities have differed.

Copyright at common law.

The ground of the author's right, and its subject-matter, are discussed as follows by Erle, J.:—[3]

Origin and subject of copyright.

"The origin of the property is in production. As to works of imagination and reasoning, if not of memory, the author may be said to create, and, in all departments of mind, new books are the product of the labour, skill, and capital of the author. The subject of property is the order of words in the author's composition, not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation. The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation . . . . . Thus if, after composition, the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained; also, if the wrongful copies were published abroad, and the books were imported for sale without knowledge of the wrong, still the author's right to his composition would be recognised against the importer, and such sale would be stopped.

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"Again, if an author chooses to impart his manuscript to others without general publication, he has all the rights for disposing of it incidental to personalty. He may make an assignment either absolute or qualified in any degree. He may lend, or let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits. If he prints for private circulation only, he still has the same rights, and all these rights he may pass to his assignee. About the rights of the author before publication all are agreed."

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[1] *Pope* v. *Curl*, 2 Atk. 342; *Thompson* v. *Stanhope*, Amb. 737; *Perceval* v. *Phipps*, 2 V. & B. 19; 13 R. R. 1; *Gee* v. *Pritchard*, 2 Swanst. 415; 19 R. R. 87. As to lectures, see *post*, p. 247.

[2] See *Prince Albert* v. *Strange*, 1 Mac. & G. 25; *Jefferys* v. *Boosey*, 4 H. L. C. 867; *Exchange, &c. Co.* v. *Gregory*, [1896] 1 Q. B. 147.

[3] *Jefferys* v. *Boosey*, *sup.* See also the remarks in 2 Bl. 405 *et seq.*

Chap. XV.

I. Books.

8 Anne, c. 19.

In 1709, the statute 8 Anne, c. 19,[1] was passed, imposing penalties for the protection of the exclusive rights of authors and their assigns to print, publish, and dispose of, copies of their works for the term of fourteen years, and for another term of the same duration if the author should be living at the end of the first term. The question arose, but was never finally determined, whether, anterior to the statute of Anne, there existed at common law a perpetual copyright in published works. The weight of authority in the time of Lord Mansfield was in favour of the existence of such a right, but the doctrine found less favour in modern times.[2] It was, however, finally decided by the House of Lords in *Donaldsons* v. *Becket*,[3] that whether such a right did or did not exist before the statute of Anne, that statute had abridged the right of the author, so that he had thenceforth no property in his published works beyond the periods specified in the statute; and it must now be considered to be settled that copyright or protection to works of literature, after they have been published, exists only by statute.[4]

15 Geo. III. c. 53.

In consequence of this decision, the statute 15 Geo. 3, c. 53, was passed for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books, given or bequeathed to them for the advancement of learning and other purposes of education.[5] And in 1801 and 1814 the statutes 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, were passed, extending for the benefit of authors the period of copyright.

5 & 6 Vict. c. 45.

In 1842 the statutes of 1709, 1801, and 1814, were repealed by the statute 5 & 6 Vict. c. 45, by which, as amended,[6] the copyright

[1] So numbered in Ruffhead's ed., but it is 8 Ann. c. 21, in the Statutes of the Realm and in the Revised Statutes.

[2] Per Williams, J., in *Reade* v. *Conquest*, 9 C. B. N. S. 755, 766. See *Jefferys* v. *Boosey*, 4 H. L. C. 815, *ante*, p. 238; and *Millar* v. *Taylor*, 4 Burr. 2303.

[3] 4 Burr. 2408.

[4] See per Williams, J., in *Reade* v. *Conquest*, *sup.*; referring to *Donaldsons* v. *Becket*, 4 Burr. 2408. There is an interesting note by the reporter, at the end of the latter case, as to "the real and true times and persons when and by whom the art of printing was originally discovered, and when and how it was afterwards first introduced into this country."

[5] The rights given by this Act are preserved by 5 & 6 Vict. c. 45, s. 27.

[6] 39 & 40 Vict. c. 36, ss. 42, 44, 45; 45 & 46 Vict. c. 40; 51 & 52 Vict. c. 17.

of authors and their assigns in "books" and in "dramatic pieces or musical compositions" is now regulated.

Definitions —"Book,"

"Book" is defined to mean and include :—[1]

"Every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map,[2] chart,[2] or plan[2] separately published."

A "book" must be the result of some literary labour,[3] but it may be composed wholly or partly of prints or illustrations.[4] Where a book depends for its value upon a particular portion, that portion may be copyright though the rest is not.[5]

Notwithstanding this definition, not every verbatim reprint of part of a book is an infringement of copyright. "Books are published with an expectation, if not a desire, that they will be criticised in reviews, and, if deemed valuable, that parts of them will be used as affording illustrations by way of quotation or the like; and, if the quantity taken be neither substantial nor material, if, as it has been expressed by some judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought."[6]

But "to multiply copies of a material portion of a work entitled to copyright is as much a breach of the law, though differing in degree, as to multiply copies of the whole work. And it has long been settled that multiplying copies for private distribution among a limited class of persons is just as illegal as if it were done for the purpose of sale."[7]

—"Dramatic piece,"

"Dramatic piece" is defined to mean and include :—[8]

"Every tragedy, comedy, play, opera, farce, or other scenic, musical or dramatic entertainment."

—"Copyright."

"Copyright" is defined to mean :—[8]

"The sole and exclusive liberty of printing or otherwise multiplying copies."

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[1] 5 & 6 Vict. c. 45, s. 2.

[2] See *Stannard* v. *Lee*, 6 Ch. 346; *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420.

[3] *Schove* v. *Schmincke*, 33 Ch. D. 546; *Leslie* v. *Young*, [1894] A. C. 335; *Chilton* v. *Progress Co.*, [1895] 2 Ch. 29.

[4] *Maple* v. *Junior Army, &c. Stores*, 21 Ch. D. 369; *Lamb* v. *Evans*, [1893] 1 Ch. 218.

[5] *Leslie* v. *Young*, *supra*.

[6] Per Lord Hatherley, *Chatterton* v. *Cave*, 3 App. Cas. 492; cited per Stirling, J., in *Warne* v. *Seebohm*, 39 Ch. D. 79; *Leslie* v. *Young*, [1894] A. C. 335, 341.

[7] Per Kay, J., *Ager* v. *P. & O. Co.*, 26 Ch. D. 637, 641.

[8] 5 & 6 Vict. c. 45, s. 2.

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It also, in reference to dramatic pieces and musical compositions, means the sole right of public representation or performance.[1]

Extent and duration of copyright.

The term of copyright in every "book" published in the lifetime of its author is the life of the author and the further term of seven years from his death, or 42 years from first publication if the seven years sooner expire, and such copyright is to be the property of the author and his assigns; and the copyright in every "book" published after the author's death is for the term of 42 years from first publication; and such copyright is to be the property of the proprietor of the author's manuscript from which the book is first published and his assigns.[2]

Work must be original.

The work must be *original*, and if it is not original there can be no copyright in it.[3] It must be a composition of the author; something which has grown up in his mind, the product of something which, if it were applied to patent rights, would be called invention.[4]

Infringement.

"Literary property can be invaded in three modes:—First, where a publisher in this country publishes an unauthorized edition of a work in which copyright exists, or where a man introduces and sells a foreign reprint of such a work, that is open piracy. The second mode is where a man, pretending to be the author of a book, illegitimately appropriates the fruit of a previous author's literary labour, and that is literary larceny. Those are the two modes of invasion against which the Copyright Acts have protected an author. There is another mode which is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name or title of another man or as another man's work; that is not an invasion of copyright; it is common law fraud, and can be redressed by ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyright Acts. . . . . Before a man can establish any right of complaint, he must bring the case under one of these three heads."[5] The principle on which this last right rests is that one man is not entitled to represent his goods for sale as being the goods of someone else.[6]

Area of copyright.

It has been held that the publication of the book must be in the United Kingdom, that the area, over and through which protection

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[1] Ss. 20, 21.

[2] S. 3.

[3] Per Jessel, M.R., *Dicks* v. *Yates*, 18 Ch. D. 89.

[4] Per Lush, L.J., *ib.* 92.

[5] Per James, L.J., *ib.*, p. 90. See *Borthwick* v. *The Evening Post*, 37 Ch. D. 449.

[6] See *ante*, Chap. XIII., p. 198.

is granted by the Act, is the whole of the British dominions; and that the protection is given to the author, if a subject of the Crown, whether he be or be not in the British dominions at the time of publication; but, if he be an alien friend, only if he be in the United Kingdom, or elsewhere in the British dominions, at the time of publication.[1]

Periodical works, &c.

The same copyright as is given to authors of "books" is given to a publisher or other person projecting, conducting and carrying on, or being the proprietor of, any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, who employs any person to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, when such works, &c., have been composed, upon the terms that the copyright shall belong to such publisher or other person and have been paid for by him;[2] except that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature,[3] after 28 years from publication the right of publishing the same in a separate form reverts to the author for the remainder of the term given by the Act, and during the term of 28 years his consent to publication of such essay, article, or portion separately or singly is necessary.[4] If the author has not parted with the copyright, he can sue for any infringement even before publication in a separate form.[5]

It is not necessary that it shall have been agreed expressly or in writing that the copyright shall belong to the publisher or other person; it is sufficient if such an agreement can fairly be inferred from the circumstances of the case.[6]

Newspapers.

A newspaper is a "periodical work" within the provisions above cited, and in order to maintain an action for piracy of an article, the proprietor must register the newspaper, and must show not

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[1] *Jefferys* v. *Boosey*, 4 H. L. C. 815. See *Routledge* v. *Low*, L. R. 3 H. L. 100, where Lords Cairns and Westbury, expressed opinions (not however necessary to the decision of the case) that the protection of the Act extends to alien friends wherever resident. As to a work first produced in the colonies, see 49 & 50 Vict. c. 33, s. 8, *post*, p. 255.

[2] *Brown* v. *Cooke*, 16 L. J. Ch. 143. Accordingly no action can be maintained until payment has been made; *Trade Auxiliary Co.* v. *Middlesborough Assocn.*, 40 Ch. D. 425, 431.

[3] Observe that encyclopædias are not mentioned in this part of the section.

[4] 5 & 6 Vict. c. 45, s. 18. See *Henderson* v. *Maxwell*, 4 Ch. D. 163.

[5] *Johnson* v. *Newnes*, [1894] 3 Ch. 663.

[6] *Lamb* v. *Evans*, [1893] 1 Ch. 218; *Johnson* v. *Newnes*, [1894] 3 Ch. 663.

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only that the composer of the article has been paid for it,[1] but also that it was composed on the terms that the copyright should belong to the proprietor.[2] There is, or may be, copyright in the particular form of language or modes of expression by which information is conveyed in a newspaper.[3]

Representing or performing dramatic piece or musical composition.

The sole liberty of representing or performing, or causing, or permitting to be represented or performed, any dramatic piece or musical composition is made to endure and be the property of the author and his assigns for the same term as the copyright in books; and the first public representation or performance is equivalent to first publication.[4]

The right of dramatic representation or performance must be distinguished from the right to publish or print the play or composition as a literary work or "book"; and public performance is not a publication so as to affect the latter right.[5]

No assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition is to convey the right of representing or performing the same, unless the assignment is entered on the register expressing the intention of the parties that such right should pass.[6] The penalties imposed by the statute 3 & 4 Wm. 4, c. 15, on persons infringing the sole liberty of representing dramatic pieces, are extended to infringement of the rights of the author or his assignee under the Act of 1842, both in respect of dramatic pieces and musical compositions;[7] namely, for each representation not less than forty shillings, or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever damages are the greater.[8]

3 & 4 Will. 4, c. 15.

A subsequent Act provides, in respect of musical compositions,[9] that a nominal penalty or damages may be awarded, and that the

51 & 52 Vict. c. 17.

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[1] See note [2], *ante*, p. 243.

[2] *Walter* v. *Howe*, 17 Ch. D. 708. See *Trade Auxiliary Co.* v. *Middlesborough Assocn.*, 40 Ch. D. 425, 433; *Cate* v. *Devon, &c. Newspaper Co.*, 40 Ch. D. 500; *Walter* v. *Steinkopff*, [1892] 3 Ch. 489.

[3] *Walter* v. *Steinkopff*, *supra*.

[4] 5 & 6 Vict. c. 45, s. 20. This section as to dramatic representations merely extends the right which was first given by 3 & 4 Will. 4, c. 15.

[5] *Macklin* v. *Richardson*, Amb. 694; *Reade* v. *Conquest*, 9 C. B. N. S. 755; 11 *id.* 749; *Warne* v. *Seebohm*, 39 Ch. D. 73.

[6] 5 & 6 Vict. c. 45, s. 22.

[7] 3 & 4 Will. 4, c. 15, s. 2; 5 & 6 Vict. c. 45, s. 21. See *Duck* v. *Bates*, 13 Q. B. D. 843; *Wall* v. *Taylor*, 11 Q. B. D. 102.

[8] 3 & 4 Will. 4, c. 15, s. 2.

[9] As to what is a musical composition, see *Fuller* v. *Blackpool, &c. Co.*, [1895] 2 Q. B. 429.

costs shall be in the absolute discretion of the judge; and further that the proprietor or occupier of the place of representation who does not wilfully permit the same shall be exempt. This Act does not apply to performances of operas or stage plays in a theatre or other licensed place of entertainment.[1]

In the case of a musical composition,[2] published after August 10th, 1882, in order to prevent the right of public representation or performance there must be notice on the title-page that such right is reserved.[3] 45 & 46 Vict. c. 40.

Registration.

A book of registry is required by the Act of 1842 to be kept at Stationers' Hall, wherein may be registered the proprietorship in the copyright of books and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright.[4] The time of first publication or first public representation, as the case may be, must be entered.[5] The proprietor, whether the author or an assignee, cannot take any proceedings in respect of an infringement until he has been registered.[6] The registration must be in the name of the proprietor and not of his nominee or agent.[7] The omission to register does not affect the copyright, but only the right to sue for infringement.[8]

Piracy.

A right of action is given to the proprietor in any Court of Record in that part of the British dominions in which piracy or infringement of his copyright in any book is committed; that is to say, the printing or causing to be printed, for sale or exportation, without his consent in writing, or importing for sale or hire any book so unlawfully printed from parts beyond the sea, or knowingly selling, publishing, or exposing for sale or hire or causing the same to be done, or possessing for sale or hire any book so unlawfully printed or imported without such consent.[9] All copies unlawfully printed or imported are to be deemed the property of the registered proprietor of the copyright who may

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[1] 51 & 52 Vict. c. 17.

[2] As to what is a musical composition, see *Fuller* v. *Blackpool, &c. Co.*, *supra*.

[3] 45 & 46 Vict. c. 40, s. 1; *Fuller* v. *Blackpool, &c. Co.*, *supra*.

[4] 5 & 6 Vict. c. 45, s. 11.

[5] 5 & 6 Vict. c. 45, ss. 13, 14, 20. See *Thomas* v. *Turner*, 33 Ch. D. 292; and *Hayward* v. *Lely*, 56 L. T. 418, as to new editions; *Henderson* v. *Maxwell*, 4 Ch. D. 163, as to magazines; *Johnson* v. *Newnes*, [1894] 3 Ch. 663, as to serials.

[6] 5 & 6 Vict. c. 45, s. 24; *Johnson* v. *Newnes*, [1894] 3 Ch. 663; *Liverpool, &c. Assocn.* v. *Commercial, &c. Bureaux*, [1897] 2 Q. B. 1.

[7] *Petty* v. *Taylor*, [1897] 1 Ch. 465.

[8] 5 & 6 Vict. c. 45, s. 24.

[9] *Ib.* s. 15.

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sue for and recover the same or damages for the detention or conversion thereof.[1]

Dramatization of novel.

Copyright being the sole right to print or otherwise multiply copies of a book, it is not an infringement of that right to dramatize a novel or story and to cause the drama to be publicly represented; but if the dramatist for the purpose of dramatization prints or otherwise multiplies copies of the book, or copies of the play which contain material portions of the book, he violates the rights of the author.[2]

Actions, &c. under Act of 1842 to be commenced within twelve months.

All actions or proceedings for any offence against the Copyright Act, 1842, must be commenced within twelve calendar months next after the offence committed.[3] But this limitation of time is not to extend to proceedings to obtain copies of books which, after publication, must in all cases be delivered for the use of the Library of the British Museum, and, after demand, for the use of the Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin.[4]

Copyright is personal property.

It is expressly enacted that all copyright shall be deemed personal property, and shall be transmissible by bequest, or in case of intestacy shall be subject to the same law of distribution as other personal property.[5]

Books prohibited to be imported.

39 & 40 Vict. c. 36.

By the Customs Laws Consolidation Act, 1876, it is prohibited to import into the United Kingdom :—

"Books wherein the copyright shall be first subsisting, first composed or written or printed in the United Kingdom, or printed or reprinted in any other country, as to which the proprietor of such copyright or his agent shall have given to the Commissioners of Customs a notice in writing, duly declared, that such copyright subsists, such notice also stating when such copyright will expire."[6]

The Commissioners are to cause to be made, and publicly exposed at the Customs Houses in the several ports, lists of all books in which the copyright is subsisting, and as to which the proprietor or his agent has given notice in writing accompanied with the prescribed declaration.[7]

Knowledge immaterial.

In an action for piracy it is not generally necessary for the plaintiff to aver or prove that the defendant knowingly infringed

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[1] 5 & 6 Vict. c. 45, s. 23.

[2] *Warne* v. *Seebohm*, 39 Ch. D. 73.

[3] 5 & 6 Vict. c. 45, s. 26; 3 & 4 Will. 4, c. 15, s. 3.

[4] 5 & 6 Vict. c. 45, ss. 6—10, 26.

[5] *Ib.* s. 25.

[6] 39 & 40 Vict. c. 36, s. 42.

[7] *Ib.* ss. 44, 45.

the plaintiff's right, which does not depend on the innocence or guilt of the defendant.[1] There are some exceptions, as in sect. 3 of 51 & 52 Vict. c. 17,[2] and sect. 1 of 5 & 6 Will. 4, c. 65.

II. Lectures. 5 & 6 Will. 4, c. 65.

For the protection of authors of lectures and their assigns against the publication of lectures without their consent, the sole right and liberty of printing and publishing lectures was, by the statute 5 & 6 Wm. 4, c. 65, declared to belong to the author or his assigns; and penalties were imposed upon persons, including the printers and publishers of newspapers, infringing such copyright. Persons having leave to attend a lecture, for fee or otherwise, are not to be taken to have leave to copy or publish the lecture.[3] The Act does not extend to lectures, of the delivery of which notice in writing has not been given to two justices within five miles of the place of delivery at least two days before delivering the same, or to lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation: and the law relating thereto is to remain the same as if the Act had not been passed.[4]

The effect of the statute is to secure their right of property to authors of lectures and to persons to whom the right has been sold or conveyed, notwithstanding delivery, upon their compliance with certain preliminaries. Its provisions are not confined to cases in which the right would have been protected at common law, but extend to many cases in which, according to that law, delivery would have been equivalent to publication.[5] But, as to the exceptional cases, there is a reservation of such common law right, if any, as existed before the Act; and it has been held that, at common law, the author of a lecture retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public generally; but that upon such publication being made his right of property ceases to exist.[6]

It is not, however, every kind of communication which will

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[1] Per Wilde, C.J., *Lee* v. *Simpson*, 3 C. B. 883; *Reade* v. *Conquest*, 11 C. B. N. S. 492.

[2] *Ante*, p. 245.

[3] 5 & 6 Will. 4, c. 65, s. 3.

[4] *Ib.* s. 5. See *Nicols* v. *Pitman*, 26 Ch. D. 374.

[5] Per Lord Watson, *Caird* v. *Sime*, 12 App. Cas. 351.

[6] *Caird* v. *Sime*, *supra*.

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destroy the proprietary right; for the author may communicate the work to others under such limitations and restrictions as not to interfere with his rights; in which case the retention of the right depends upon its being either matter of contract or an implied condition under which the communication is made; as where it is by a university professor to his class.[1]

III. Engravings, etchings, prints, lithographs.

8 Geo. 2, c. 13.

7 Geo. 3, c. 38.
17 Geo. 3, c. 57.
15 & 16 Vict. c. 12, s. 14.

The piracy of the works of Hogarth led, it is said,[2] to the passing, in 1735, of the first statute, 8 Geo. 2, c. 13, for conferring on the inventor *and* designer a copyright in engravings, etchings, or works in mezzo-tinto or chiaro-oscuro, of any historical or other prints. That Act was extended by the subsequent statutes of 1767, 1777, and 1852, the joint effect of which is to secure the copyright or sole right of printing and reprinting to every person who "invents *or* designs, engraves, etches, or works in mezzo-tinto or chiaro-oscuro, or from his own work, design, or invention, causes or procures to be designed, engraved, etched or worked in mezzo-tinto or chiaro-oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map,[3] chart, or plan, or any other print or prints whatsoever, and to every person who engraves, etches, or works in mezzo-tinto or chiaro-oscuro, or causes to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, notwithstanding such print has not been graven or drawn from his own original design,"[4] including "prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely."[5]

Duration of copyright and enforcement.

The term of copyright under these Acts is twenty-eight years from first publication.[6] The name of the proprietor must on publication appear on every plate or print,[7] but registration is not provided for. Any offender is made subject to penalties within six months after the offence,[8] and to damages at the suit of the proprietor.[9]

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[1] *Caird* v. *Sime*, *supra*.

[2] Copinger on Copyright, 398.

[3] *Query* whether these Acts, as well as 5 & 6 Vict. c. 45 (*ante*, p. 241), apply to maps. See *Stannard* v. *Lee*, 6 Ch. 346; and *Stannard* v. *Harrison*, 19 W. R. 811.

[4] 15 & 16 Vict. c. 12, s. 14, preamble.

[5] *Ib.* s. 14.

[6] 7 Geo. 3, c. 38, s. 7.

[7] 8 Geo. 2, c. 13, s. 1; *Graves* v. *Ashford*, L. R. 2 C. P. 410.

[8] 8 Geo. 2, c. 13, s. 1; 7 Geo. 3, c. 38, s. 6.

[9] 17 Geo. 3, c. 57. See 24 & 25 Vict. c. 101.

IV. Sculpture. 54 Geo. 3, c. 56.

The first Act for Protection of Copyright in Sculpture was passed in 1799, "for encouraging the art of making new models and casts of busts and other things";[1] but, proving ineffectual, it was in 1814 replaced by the present Sculpture Copyright Act.[2] By that Act the sole right and property of all new and original sculptures, models, copies, and casts of any of the subjects therein mentioned belong to the person making or causing the same to be made for the term of fourteen years from "first putting forth or publishing" the same, provided that the proprietor's name and the date be put on the work before it is put forth or published.[2]

Any person who makes, imports, or sells any copies of works protected by the Act is liable, if sued within six months of the discovery of the offence,[3] to pay damages to the proprietor of the work,[4] unless he has by deed purchased the right or property in the work from the proprietor.[5]

After the fourteen years, if the original proprietor is still living, the copyright is to return to him for a further term of fourteen years.[6]

Registration.

Under the Designs Act, 1850,[7] the proprietor of any sculpture, &c., could register, and then recover penalties in respect of the offences above mentioned; but that Act was repealed by the Patents, Designs and Trade Marks Act, 1888.[8]

The proprietor can obtain an injunction restraining an infringement of his right.[9]

V. Paintings, drawings, photographs. 25 & 26 Vict. c. 68.

The last of the fine arts to obtain the protection of copyright were paintings, drawings, and photographs, by the Fine Arts Copyright Act, 1862.[10] Under this Act, where the author is a British subject or resident within the dominions of the Crown, the right is conferred on such author of every original painting, drawing, and photograph,[11] made either in the British dominions or elsewhere, and not sold or disposed of before the 29th July, 1862, and his assigns.[10] The right is described as "the sole and exclusive right

[1] 38 Geo. 3, c. 71.

[2] 54 Geo. 3, c. 56, s. 1.

[3] *Ib.* s. 5.

[4] *Ib.* s. 3.

[5] *Ib.* s. 4.

[6] *Ib.* s. 6. The latter part of this section is repealed by the Statute Law Revision Act, 1873.

[7] 13 & 14 Vict. c. 104, ss. 6, 7.

[8] 46 & 47 Vict. c. 57, s. 113, Sched. 3. See s. 60.

[9] *Caproni* v. *Alberti*, 65 L. T. 785.

[10] 25 & 26 Vict. c. 68, ss. 5, 6.

[11] As to who is the "author" of a painting, drawing, or photograph, see *Nottage* v. *Jackson*, 11 Q. B. D. 627; *Kenrick* v. *Lawrence*, 25 Q. B. D. 99; *Melville* v. *Mirror Co.*, [1895] 2 Ch. 531; *Ellis* v. *Marshall*, 64 L. J. Q. B. 757.

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of copying, engraving, reproducing and multiplying such painting or drawing, and the design thereof, or such photograph and the negative thereof, by any means and of any size, for the term of the natural life of the author and seven years after his death."[1]

If a painting, drawing, or negative of a photograph is, for the first time, sold or disposed of after 1862, or is made for another person for good consideration, the person selling, disposing of, or making the same does not retain the copyright unless it is expressly reserved to him by a written agreement, and the assignee or other person does not acquire the copyright unless there is a written agreement to that effect.[1] The effect of this would seem to be that, if there is no agreement in writing, the copyright ceases to exist.[2]

Registration.

A register is to be kept at Stationers' Hall of every copyright under the Act, and of every subsequent assignment of it: until registration no proprietor is entitled to the benefit of the Act, and no action is sustainable, or penalty recoverable, in respect of anything done before registration.[3] Registration of a book under the Act of 1842 is not registration in respect of drawings in the books, if the copyright in the drawings is not vested in the author of the book.[4]

Piracy.

In case of piracy or infringement the proprietor of the copyright may recover a penalty not exceeding 10*l.* for every offence, and the unlawful copies, &c., are forfeited to him.[5] Such penalties and forfeitures may be enforced by action or by summary proceedings.[6] The proprietor may also sue for an injunction,[7] and for damages.[8]

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[1] 25 & 26 Vict. c. 68, s. 1.

[2] See Digest of the Law of Copyright, by Sir James Stephen, art. 21. But the Commissioners, in their report (§ 102), say, that if the picture is painted on commission, instead of being sold after being painted, the copyright, in the absence of any agreement, vests in the person for whom the picture is painted. Where a photographer had taken a negative likeness of a customer to supply the customer with copies for money, he was restrained from selling or exhibiting copies, on the grounds that there was an implied contract not to use the negative for such purposes, and that such sale or exhibition was a breach of confidence: *Pollard* v. *Photographic Co.*, 40 Ch. D. 345.

[3] 25 & 26 Vict. c. 68, ss. 4, 5; *Tuck* v. *Priester*, 19 Q. B. D. 48, 629.

[4] *Petty* v. *Taylor*, [1897] 1 Ch. 465.

[5] 25 & 26 Vict. c. 68, ss. 6, 7, 10. As to what is a piracy, see *Hanfstaengl* v. *Empire, &c. Co.*, [1894] 2 Ch. 1; *Hanfstaengl* v. *Baines*, [1895] A. C. 20.

[6] 25 & 26 Vict. c. 68, s. 8.

[7] *Ib.* s. 9.

[8] *Ib.* s. 11.

It is expressly enacted that all copyright under the Act is to be deemed personal estate, and shall be assignable at law; and that every assignment and every licence to use or copy by any means or process the design or work, subject of copyright, must be by some note or memorandum in writing signed by the proprietor or his agent appointed for that purpose in writing.[1]

Personal property—assignment.

VI. Designs.

In 1787 an Act[2] was first passed for the encouragement of the arts of designing and printing linens, cottons, calicoes, and muslins, by granting the sole right to use any new *and* original pattern for printing the same during the period of three months. The period of protection was subsequently prolonged;[3] and the principle of the Act was extended to secure to proprietors of designs for certain articles of manufacture the copyright of such designs for a limited time.[4] In 1842 a consolidating and amending Act was passed for the protection of the copyright of designs for ornamenting articles of manufacture, and the prior Acts were repealed.[5] This Act, with the subsequent amending Acts, was repealed by the Patents, Designs and Trade Marks Act, 1883,[6] under which, and the General Rules of the Board of Trade thereunder,[7] and the Amending Acts of 1885, 1886, and 1888,[8] the protection to the proprietor of any new *or* original design is now regulated.

46 & 47 Vict. c. 57.

Design—copyright in—proprietor of.

For the purposes of the Act "design," which it will be observed is not confined to designs for purposes of ornament, and "copyright" therein are thus defined[9]:—

> "Design"[10] means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern,[10] or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for a sculpture,

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[1] 25 & 26 Vict. c. 68, s. 3. See *London Printing Alliance* v. *Cox*, [1891] 3 Ch. 291; *Petty* v. *Taylor*, [1897] 1 Ch. 465.

[2] 27 Geo. 3, c. 38.

[3] 29 Geo. 3, c. 19; 34 Geo. 3, c. 23; and 2 Vict. c. 13.

[4] 2 Vict. c. 17.

[5] 5 & 6 Vict. c. 100, s. 1.

[6] 46 & 47 Vict. c. 57, s. 113.

[7] *Ib.* s. 101.

[8] 48 & 49 Vict. c. 63; 49 & 50 Vict. c. 37; 51 & 52 Vict. c. 50.

[9] 46 & 47 Vict. c. 57, s. 60.

[10] *Heath* v. *Rollason*, [1898] A. C. 499.

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or other thing within the protection of the Sculpture Copyright Act of the year 1814.

"Copyright" means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered.

"Proprietor" is defined as follows[1]:—

> The author of any new and original design[2] shall be considered the proprietor thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case such person shall be considered the proprietor, and every person acquiring for a good or valuable consideration a new and original design, or the right to apply the same to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise.

Registration.

On application by or on behalf of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom,[3] made in the prescribed form and sent to the Patent Office, the Comptroller may register the design.[4] The application must contain a statement of the nature of the design, and the class or classes of goods in which it is desired that it should be registered,[5] and be accompanied with the prescribed number of copies.[6] Copyright in a design is limited to the class in which the design is registered:[7] but the same design may be registered in more than one class. In case of doubt as to the class in which it ought to be registered, the Comptroller may decide the question; also he may, if he thinks fit, refuse to register any design, subject to appeal to the Board of Trade.[8] The Comptroller is to grant a certificate of registration to the proprietor of the design when registered, and in case of loss of the original, or in any other case in which he deems it expedient, he may grant a copy or copies of the certificate.[9]

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[1] 46 & 47 Vict. c. 57, s. 61.

[2] See *Le May* v. *Welch*, 28 Ch. D. 24.

[3] See *Blank* v. *Footman*, 39 Ch. D. 678; *Re Bach*, 42 Ch. D. 661; *Re Clarke*, [1896] 2 Ch. 38.

[4] 46 & 47 Vict. c. 57, s. 47 (1), (2). For form, see 1st Schedule.

[5] *Ib.* s. 47 (3). See *Re Read*, 42 Ch. D. 260; *Re Bach*, *ib.* 661.

[6] *Ib.* s. 48. See s. 52.

[7] *Re Read*, *supra*.

[8] 46 & 47 Vict. c. 57, s. 47 (4), (5), (6), (7). See s. 86, as amended by s. 25 of the Act of 1888.

[9] *Ib.* s. 49.

Exhibitions.

The exhibition of a design or any article to which it is applied at an Industrial or International Exhibition certified as such by the Board of Trade, or the exhibition elsewhere during the Exhibition without the privity or consent of the proprietor, or the publication of a description of a design during any such Exhibition will not prevent the design from being registered, or invalidate the registration; provided that the exhibitor give the Comptroller notice of his intention to exhibit, and the application for registration is made within six months from the date of opening of the Exhibition.[1] This protection may be extended by Her Majesty by Order in Council to any Exhibition held out of the United Kingdom, which order may also provide that the exhibitor shall be relieved from the condition as to notice, absolutely or upon terms.[2]

Duration of copyright.

In place of the periods of protection varying, as formerly, according to the class of goods, the copyright in a registered design now extends in all cases to one period of five years from the date of registration.[3]

Before delivery on sale the proprietor must cause each article to be marked with the prescribed mark, denoting that the design is registered, or his copyright will cease, unless he shows that he took all proper steps to ensure the marking of the article.[4]

The copyright will also cease if the design is used in manufacture in any foreign country, and is not used in this country, within six months of its registration.[5] This provision is new, and it will be observed that it is not confined to use abroad by the proprietor.

Registers.

In the Register of Designs at the Patent Office are to be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may from time to time be prescribed; and the register will be *primâ facie* evidence of the matters entered therein under the Act.[6] The person for the time being entered as proprietor has, subject to the provisions of the Act and to any rights appearing from the register to be vested in any other person, power absolutely to assign, grant licences as to, or otherwise deal with, the copyright, and give effectual receipts for any con-

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[1] 46 & 47 Vict. c. 57, s. 57.

[2] 49 & 50 Vict. c. 37, s. 3.

[3] 46 & 47 Vict. c. 57, s. 50 (1).

[4] *Ib.* s. 51. For instance of the exception, see *Wittman* v. *Oppenheim*, 27 Ch. D. 260.

[5] *Ib.* s. 54.

[6] *Ib.* s. 55.

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sideration therefor; provided that any equities may be enforced as in respect of any other personal property,[1] but there must not be entered on the register or received by the Comptroller notice of any trust.[2]

During the existence of copyright, the design is not open to inspection, except by the proprietor, or a person authorised in writing by him or a person authorized by the Comptroller or by the Court and furnishing such information as may enable the Comptroller to identify the design, nor except in the presence of the Comptroller or his officer, and on payment of the prescribed fee; and the person making the inspection may not take a copy of the design or any part of it.[3] When, however, the copyright has ceased, the design is to be open to inspection, and copies may be taken by any person on payment of the prescribed fee,[4] or certified copies obtained.[5] Certified and sealed copies or extracts of or from the register are to be received in evidence without further proof or production of the originals.[6] The Court may, on the application of any person aggrieved, order the register to be rectified,[7] and the Comptroller may correct a clerical error.[8]

On the request of any person producing a particular design, with its mark of registration, or producing only its mark of registration, or furnishing such information as may enable the Comptroller to identify the design, and on payment of the fee, the Comptroller is to inform him whether the registration still exists, and in respect of what class or classes of goods, and the date of registration, and the name and address of the proprietor.[9]

Piracy.

The Act makes it unlawful for any person, during the existence of the copyright, without the written consent of the registered proprietor, to apply, or cause to be applied,[10] such design, or any fraudulent or obvious imitation thereof, in the class in which the design is registered, for the purposes of sale to any article; or to publish or expose for sale any such article knowing that the registered proprietor has not consented.[11] For every such offence the proprietor may, by action, recover a penalty not exceeding 50*l.* from the offender;[11] provided that the total sum forfeited in respect of

[1] 46 & 47 Vict. c. 57, s. 87, amended by 51 & 52 Vict. c. 50, s. 21.
[2] 46 & 47 Vict. c. 57, s. 85.
[3] 46 & 47 Vict. c. 57, s. 52 (1), subject to the exception in s. 6 of the Act of 1888.
[4] *Ib.* ss. 52 (2), 56.
[5] *Ib.* s. 88.
[6] *Ib.* s. 89.
[7] *Ib.* s. 90.
[8] *Ib.* s. 91.
[9] *Ib.* s. 53.
[10] 51 & 52 Vict. c. 50, s. 7.
[11] 46 & 47 Vict. c. 57, s. 58.

any one design shall not exceed 100*l.*[1] The proprietor may, if he so elects, sue for damages.[2] The registered proprietor only can sue for any infringement.[3]

Any person who describes any design applied to any article sold by him as registered, which is not so, is made liable for every offence on summary conviction to a fine not exceeding 5*l.*[4]

VII. International and colonial copyright.

As regards literary and artistic works first published in a foreign country, certain statutes, styled the International Copyright Acts,[5] have been passed, authorizing Her Majesty by Order in Council to direct that the author shall have copyright in the same during the period specified by the Order, which must not exceed the period during which authors of the like works first published in the United Kingdom have copyright. In September, 1885, an International Conference was held at Berne, and a draft convention agreed to for giving to authors of literary and artistic works, first published in one of the countries parties to the convention, copyright in such works throughout the other countries parties to the convention. For the purpose of carrying such convention into effect in Her Majesty's dominions, the International Copyright Act, 1886, was passed;[6] and, on November 28th, 1887, an Order in Council[7] was issued adopting the Berne convention, which Order is to be construed as if it formed part of the Act of 1886.[8] That convention has been adopted by England, Belgium, France, Germany, Italy, Spain, Switzerland, and some other smaller states, and these countries form what is called the "Copyright Union."[9] Within this union the copyright of authors belonging to any one of these countries is protected in the other countries. The author of any literary or artistic work, first produced after December 6th, 1887, in one of these countries, if he is a citizen of one of them, has the same copyright within the British dominions as if the work had been first produced in the United Kingdom.[10] No greater right or longer term of copyright

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[1] 51 & 52 Vict. c. 50, s. 7.

[2] 46 & 47 Vict. c. 57, s. 59.

[3] *Woolley* v. *Broad*, [1892] 1 Q. B. 806.

[4] 46 & 47 Vict. c. 57, s. 105.

[5] 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12; 25 & 26 Vict. c. 68, s. 12; 38 & 39 Vict. c. 12.

[6] 49 & 50 Vict. c. 33.

[7] Copinger, App. p. cxxiii.

[8] S. 8 of the Order.

[9] Austria and Hungary have a separate convention. In the United States there is a special Act.

[10] S. 3 of the Order.

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is, however, conferred than that enjoyed in the foreign country in which such work was first produced.[1] If the author of a work so produced is not a citizen of one of the countries of the union, the copyright belongs to the publisher.[2] The Act of 1886 makes the Order in Council retrospective, but not so as to affect any rights or interests arising from or in connection with any work lawfully produced in the United Kingdom before the publication of the Order.[3] Protection is also given in respect of the production or importation of translations.[4]

Registration.

Compliance with the conditions and formalities required in the country where the work is first produced gives a right to sue for infringement in this country, and registration in this country is not necessary.[5]

Remedies.

In order to prevent infringements in a foreign country a British author must take proceedings in the courts of that country.[6] The owner of the British copyright in a book first published in a foreign country can, however, prevent the importation into Great Britain of copies printed in that foreign country by the proprietor of the copyright there.[7]

British possessions.

By the Act of 1886 the different Copyright Acts already referred to were made to apply to literary or artistic works first produced in a British possession in like manner as they apply to a work first produced in the United Kingdom, and registration in accordance with the law of such possession is sufficient.[8]

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[1] 49 & 50 Vict. c. 33, s. 2 (3). See *Hanfstaengl* v. *American Tobacco Co.*, [1895] 1 Q. B. 347.

[2] Berne Convention, Arts. 2, 3; Order, s. 4.

[3] 49 & 50 Vict. c. 33, s. 6. See *Moul* v. *Groenings*, [1891] 2 Q. B. 443; *Hanfstaengl* v. *American Tobacco Co.*, *supra*.

[4] 49 & 50 Vict. c. 33, s. 5: Berne Convention, Arts. 5, 6.

[5] *Hanfstaengl* v. *American Tobacco Co.*, *supra*.

[6] *Morocco Bound* v. *Harris*, [1895] 1 Ch. 535.

[7] *Pitts* v. *George*, [1896] 2 Ch. 866.

[8] 49 & 50 Vict. c. 33, ss. 8, 9.

CHAPTER XVI.

COMPANIES—SHARES—DEBENTURES—DEBENTURE STOCK.

LINDLEY, L. J., defines a company as follows:—

Company defined.

"By a company is meant an association of many persons who contribute money or money's worth to a common stock, and employ it in some trade or business, and who share the profit or loss (as the case may be) arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are *members*. The proportion of capital to which each member is entitled is his *share*. Shares are always transferable; although the right to transfer them is often more or less restricted."[1]

Difference between a company and a partnership.

The difference between an ordinary partnership and a company has been explained by James, L.J., thus:[2]

"An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some definite object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members, and to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that, so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. This object, as regards liabilities, could not in point of law be attained by any arrangement between the persons themselves, unless the persons contracting with them authorized the change by a novation, or unless, by special provisions in Acts of Parliament, sanction was given to such arrangements."

It will be observed that a company as thus defined differs from an ordinary partnership in that any member of the company can

[1] Lindley on the Law of Companies, p. 1. See *Reg.* v. *Registrar of Jt. St. Companies*, [1891] 2 Q. B. 598.

[2] *Smith* v. *Anderson*, 15 Ch. D. 273.

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transfer his share so as to enable the transferee to take his place in the company, whereas in an ordinary partnership no partner is at liberty without the consent of all the other partners to retire from the firm and substitute another person in his place as partner, and an assignment of his share does not entitle the assignee to become a partner.[1]

Unincorporated companies.

But in most respects an unincorporated company may be regarded as being a mere private partnership, which, in English law,[2] has no existence as a legal *persona* distinct from the members of the firm. Each partner is the agent of the others to contract on behalf of them all as to matters within the scope of the business,[3] and creditors contract with the partners as individuals. It follows that every member of an unincorporated company is at common law personally liable, as a partner, without limit, for the whole of the debts contracted by the company while he is a member (*ante*, p. 10); and as between the members, each has a right to make his co-partners contribute in proportion to their shares towards the payment of the partnership debts.[4] But at common law one partner could not sue other partners for contribution, and in the case of unincorporated companies with a large number of members, it was practically impossible to obtain a dissolution or winding-up of the business and an adjustment of the rights of the members *inter se*.[5]

It has been said that unincorporated companies with transferable shares are illegal at common law because the privilege of having transferable shares can only be acquired by charter or statute.[6] A great authority is, however, of opinion that this view is wrong, and that such a company is not illegal at common law, unless it can be shown to be of a dangerous and mischievous character tending to the grievance of Her Majesty's subjects.[6] It must be remembered that the formation of a company, association, or partnership con-

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[1] *Jefferys* v. *Smith*, 3 Russ. 158; 27 R. R. 49; Lindley, Partnp. 336.

[2] In Scotch law a firm or partnership is a distinct legal *persona*. See Bell's Principles of the Law of Scotland, § 357, and the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 4 (2).

[3] *Oakes* v. *Turquand*, L. R. 2 H. L. 358, *per* Lord Cranworth; *Ernest* v. *Nicholls*, 6 H. L. C. 401, 417, *per* Lord Wensleydale.

[4] Lindley, Partnp. 370, 383; Partnership Act, 1890, s. 24.

[5] See, *e.g.*, *Van Sandau* v. *Moore*, 1 Russ. 441, where a bill was filed against nearly 300 defendants; see the observations of Lord Eldon, C., as to the history of joint-stock companies, at pp. 458 *et seq.*, and 470 *et seq.*

[6] See *Duvergier* v. *Fellows*, 5 Bing. 267; 34 R. R. 578; *Blundell* v. *Winsor*, 8 Sim. 601; Lindley on Companies, 21, 130.

sisting of more than twenty persons for the purpose of carrying on business for gain is prohibited by the Companies Act, 1862, unless registered.[1]

Corporation.

On the other hand, a corporation is, in the eye of the law, a person distinct from the "corporators," *i.e.*, the members for the time being of the corporation, and the rights and obligations of the corporation are not exerciseable by or enforceable against its members; so that the only remedy of creditors of a corporation at common law is against the property of the corporation, and they have no rights against the separate property of any member of the corporation as such.[2] Nor can a member of a corporation substitute another person as a corporator in place of himself without authority from charter or statute.[3]

At common law, also, every association of persons formed in order to carry on and share the profits of a business must be either a partnership or a corporation;[4] there is no *tertium quid* such as the modern incorporated joint stock company, of which the individual members, though liable personally for debts of the company, may yet be liable only to a limited amount, and not, like ordinary partners, without limit.

A corporation[5] may, at common law, be created either by Royal Charter or by Act of Parliament; but the Crown could not, in creating a corporation, impose any personal liability for its debts on the members of the corporation until, in 1826, a statute empowered it to do so.[6]

Companies under letters patent.

In 1834 the Crown was enabled by statute[7] by means of letters patent to confer on a company certain privileges, such as the right of suing and being sued in the name of one of its officers, without incorporating it: and this may still be done under the Chartered Companies Acts, 1837,[8] which repealed both the Acts above referred to. Thus the legislature obviated the inconvenient neces-

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[1] 25 & 26 Vict. c. 89, s. 4, *post*, p. 269.

[2] "A corporation is a legal *persona* just as much as an individual; and, if a man trusts a corporation, he trusts that legal *persona*, and must look to its assets for payment: he can only call upon individual members to contribute in case the Act or charter has so provided;" *per* Cave, J., *Re Sheffield & S. Yorks. Bdg. Soc.*, 22 Q. B. D. 476. See the discussion of "Artificial Persons" in Pollock on Contract, 107 *et seq.*

[3] See *ante*, p. 130.

[4] *Macintyre* v. *Connell*, 1 Sim. N. S. 233.

[5] See, as to corporations, M. L. R. P. 83, 88; and Grant on Corporations.

[6] 6 Geo. 4, c. 91.

[7] 4 & 5 Will. 4, c. 94.

[8] 7 Will. 4 & 1 Vict. c. 73, *post*, p. 255.

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sity of making all the members of an unincorporated company parties to actions by or against the company.[1]

Company incorporated by special Act.

If a company was incorporated by special Act of Parliament without any express provision as to the liability of its members, they were not personally liable for any debts of the company; but such Acts sometimes provided that the members should be liable to the extent of the amounts unpaid on their shares.[2]

Earlier statutes.

An Act of 1844[3] enabled companies to obtain a certificate of incorporation without charter or special Act, and by an Act of 1855[4] they might be incorporated under the Act of 1844 with limited liability. These Acts were repealed and consolidated with some alterations and amendments by the Joint Stock Companies Acts of 1856 and 1857,[5] which are now replaced by the Companies Act, 1862,[6] and subsequent statutes.

Winding-up Acts.

The Act of 1844 above referred to did not provide for the dissolution and winding-up of joint stock companies; but in the years 1848 and 1849 certain statutes, known as the Winding-up Acts,[7] were passed to enable shareholders to enforce rateable contributions *inter se;* but they gave no power to creditors to institute winding-up proceedings. The Act of 1856,[8] however, contained provisions as to winding-up proceedings on petition to the Court by a creditor or contributory in cases where it was alleged that the company was unable to pay its debts; and in other cases on petition by the company itself. Under the previous Acts "the course which a creditor was to take in order to enforce a debt or demand was to sue the incorporated company as his debtor, and, having recovered judgment against that body, he was in the first instance to endeavour to levy his debt by an execution against it, and if that did not produce sufficient to satisfy him, then he was entitled to issue execution against any shareholder, or, within certain limits, against any of those who had been shareholders when his right arose."[9]

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[1] *Oakes* v. *Turquand*, L. R. 2 H. L. 358.

[2] Lindley on Companies, 4.

[3] 7 & 8 Vict. c. 110. This was the first general Joint-stock Company Act. In the same year the 7 & 8 Vict. c. 113 obliged banking companies to be incorporated by charter only. See the sketch of these Acts by Lord Cranworth, in L. R. 2 H. L. 359.

[4] 18 & 19 Vict. c. 133.

[5] 19 & 20 Vict. c. 47; 20 & 21 Vict. c. 14.

[6] 25 & 26 Vict. c. 89.

[7] 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108; and see 20 & 21 Vict. c. 78: all repealed by 25 & 26 Vict. c. 89, s. 205.

[8] 19 & 20 Vict. c. 47, ss. 59 *et seq.*; repealed by 25 & 26 Vict. c. 89, s. 205.

[9] *Per* Lord Cranworth, *Oakes* v. *Turquand*, L. R. 2 H. L. 361.

Companies under Act of 1862;

The most important classes of modern companies are—(1) Joint stock companies, incorporated by registration under the Companies Act, 1862,[1] the name and objects of the company, the amount of its capital divided into shares of a certain fixed amount, and some other particulars being set forth in a memorandum of association signed by at least seven subscribers;[2] and (2) companies (*e.g.*, railway companies), incorporated by special Acts of Parliament and regulated by the Companies Clauses Consolidation Act, 1845,[3] and the amending Acts,[4] which set forth usual provisions formerly inserted in special Acts incorporating joint stock companies for the execution of undertakings of a public nature, and provide that such provisions, save so far as they shall be expressly varied or excepted by any such special Act, shall apply to the company incorporated by such Act and to its undertaking, so far as they shall be applicable thereto.[5] The special Act names the amount of the capital of the company, the number of shares into which it is to be divided, and the amount of each share.

—under Companies Clauses Consolidation Act, 1845.

Capital.

The word "capital," as has been pointed out by Lindley, L.J.,[6] is used in many senses, the idea underlying its various meanings in connection with a company being that of "money obtained or to be obtained for the purpose of commencing or extending a company's business, as distinguished from money earned in carrying on its business." So-called borrowed capital, or "loan capital," is neither more nor less than a debt from the company to the person or persons who lend it.

"Loan capital."

"Nominal capital."

The "nominal capital" of a company is the sum which, by the special Act or charter, or memorandum of association, or other instrument by which the company is constituted, is authorized to be raised by the company, and it is generally by that instrument divided into a specified number of shares, each share being of a fixed amount. The "subscribed capital" or "issued capital" consists of so much of the nominal capital as is subscribed by persons who, by agreeing to take shares, become liable to pay to the company the amounts for which those shares have been created.[7] The "paid up capital" consists of such part of the subscribed

"Subscribed capital," or "issued capital."

"Paid-up capital."

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[1] 25 & 26 Vict. c. 89.

[2] *Ib.* ss. 6—10.

[3] 8 & 9 Vict. c. 16.

[4] 26 & 27 Vict. c. 118; 32 & 33 Vict. c. 48; 47 & 48 Vict. c. 43; 51 & 52 Vict. c. 48; 52 & 53 Vict. c. 37; Wms. P. P. 283.

[5] 8 & 9 Vict. c. 16, s. 1.

[6] Lindley on Companies, 391.

[7] *Per* Fry, L. J., *Re Almada Co.*, 38 Ch. D. 424.

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capital as has been paid to the company or credited by the company as paid[1] in respect of shares allotted and issued to the subscribers who become shareholders.[2]

"Underwriting shares."

Sometimes, on the formation of a company, an "underwriting" agreement is entered into, that is, an agreement entered into, before the shares are brought before the public, that in the event of the public not taking up the whole of them, or the number mentioned in the agreement, the underwriter will, for an agreed commission, take an allotment of such part of the shares as the public has not applied for.[3]

Contract to take shares.

A contract to take shares to be issued by a company is constituted by an application to the company for, or an offer to take, the shares, accepted by an allotment of shares to the applicant; but there is no complete contract until the fact of the allotment is communicated to the applicant,[4] for the acceptance of an offer must on general principles be communicated.[5]

Contract to purchase shares.

The nature of a contract to purchase shares, already issued in a going company, from the holder of the shares differs from that of a contract to purchase goods or chattels. It is in effect a contract by the buyer to enter into a partnership already formed, taking his share of past liabilities and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute (to the amount, if any, unpaid on the shares), and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way.[6]

"Uncalled capital."

Shares in a company are generally issued not fully paid up, and in such cases the unpaid part of the shares has to be paid when demanded or "called up" at the times required by the constitution of the company. Moneys so payable in respect of

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[1] See *post*, pp. 268, 277.

[2] As to the meaning of "subscribing" for shares, see *Arnison* v. *Smith*, 41 Ch. D. 348, 356; and as to the meaning of "issued," see *Bush's Case*, 9 Ch. 554.

[3] *Per* Cotton, L.J., *Ex p. Audain*, 42 Ch. D. 1, 6. See *Shaw* v. *Bentley*, 68 L. T. 812.

[4] *Gunn's Case*, 3 Ch. 40; *Robinson's Case*, 4 Ch. 322; *Ex p. Hall*, 63 L. T. 369. See *Household Ins. Co.* v. *Grant*, 4 Ex. D. 216; *Truman's Case*, [1894] 3 Ch. 272; *Re Consort Mines*, [1897] 1 Ch. 575.

[5] Pollock, Contr. 31; *per* Lord Blackburn, *Brogden* v. *Met. R. Co.*, 2 App. Cas. 691.

[6] *Per* Cairns, C., *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 324, *per* Lord Hatherley, *ib.* 332, *per* Lord Blackburn, *ib.* 337, as to the nature of a contract to take shares.

shares are often described as "uncalled capital," and, when payment of them is demanded by the proper authority, as "calls."[1] It sometimes happens that, when the shares are fully paid up, they are turned into "stock."[2] The distinction between shares and stock is that shares cannot be transferred in fractional parts, but stock can.[3]

"Stock."

When the original shares in a company are subscribed, it is the practice to issue to each subscriber documents called "scrip certificates," or, for brevity, "scrip," stating that he, or more commonly "the holder" of the scrip, is entitled to so many shares on which ——*l.* have been paid. The scrip confers on the person named in it the right to acquire, but does not impose on him any obligation to accept the shares; and, as a general rule, the scrip-holder does not acquire the rights of a shareholder, until his scrip is exchanged for shares. In some few companies no shares are ever issued, and the scrip-holders are the shareholders. Such companies are called "scrip companies."[4]

Scrip.

Primâ facie scrip is not negotiable, but it may be proved to be negotiable by mercantile usage in any particular case; and, even if it is not, the true owner may by his own conduct preclude himself from denying that it is transferable by delivery to a *bonâ fide* holder for value.[5]

In the absence of any provision for management of a company's business, it would seem that the majority of its shareholders must determine how it is to be conducted;[6] but it is generally provided that the management shall be entrusted to directors, who are the servants, not of individual shareholders, but of the company.[7]

Management of company—directors.

A company which is neither incorporated nor privileged by the Crown[8] or by statute is, as we have said, substantially a partner-

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[1] See Lindley on Companies, 408, as to what is the proper authority; and *Re Pyle Works*, 44 Ch. D. 583, *post*, p. 277, that it is a matter to be regulated by the articles of association until there is a winding-up, when the liquidator is the person to make calls.

[2] See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 61; Companies Act, 1862, s. 12.

[3] See *Morrice* v. *Aylmer*, 10 Ch. 148; L. R. 7 H. L. 717.

[4] Lindley on Companies, 65, 66.

[5] See *ante*, p. 165. *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194.

[6] Lindley on Companies, 298, 314.

[7] *Ib.*, 303. As to the position and functions of directors, see *Re Faure Co.*, 40 Ch. D. 141; *Re Sharpe*, [1892] 1 Ch. 167.

[8] *I. e.*, companies formed under 7 Will. 4 & 1 Vict. c. 73. See *post*, p. 265.

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ship; but an incorporated company is, in a legal point of view, distinct from its members, and its existence is not affected by changes among them.

The history of the law relating to companies will be found in Lindley on Companies.[1] We shall here confine our attention to—

(1) Cost-book mining companies;

(2) Companies constituted by letters patent under the Chartered Companies Act, 1837;[2]

(3) Companies regulated by a special Act of Parliament incorporating the Companies Clauses Consolidation Act, 1845;[3]

(4) Companies regulated by the Companies Acts, 1862 to 1898.

Cost-book companies.

(1) Cost-book mining companies are partnerships,[4] regulated by the general law of partnership except so far as that law is excluded by local custom, or by special agreement referring to and embodying such custom;[5] and except that any partner may retire at any time upon the terms that, if the company is solvent, he is entitled to receive his share of the surplus left after deducting the liabilities from the assets, and that, if it is insolvent, he pays his share of the liabilities after deducting the assets.[6] Formerly the liability of a shareholder who had retired to the creditors of the company was the same as if the company had been an ordinary partnership;[7] but by the Stannaries Act, 1869,[8] a part shareholder of a company working a mine within the Stannaries of Devon and Cornwall, and subject to the jurisdiction of the Court of, or within the cognizance of, the Vice-Warden, is not liable to contribute to the assets of the company if he ceased to be a shareholder two years before the mine ceased to be worked or before the date of the winding-up order.

A cost-book company is formed by the agreement of the adventurers, who have undertaken to work a lode, to share the adventure in certain proportions. They have no fixed capital, and they

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[1] Introduction, p. 2.

[2] 7 Will. 4 & 1 Vict. c. 73.

[3] 8 & 9 Vict. c. 16.

[4] *Kittow* v. *Liskeard Union*, L. R. 10 Q. B. 7. It follows that each shareholder is liable for all the debts of the company: *Peel* v. *Thomas*, 15 C. B. 714.

[5] Lindley on Companies, 93; *ib.*, 325 *et seq.*

[6] *Re Frank Mills Mining Co.*, 23 Ch. D. 52; *Re Prosper United Mining Co.*, 7 Ch. 286.

[7] *Tredwen* v. *Bourne*, 6 M. & W. 461; *Lanyon* v. *Smith*, 3 B. & S. 938.

[8] 32 & 33 Vict. c. 19, s. 25.

appoint an agent, called a purser, who manages the mine. The agreement, the receipts and expenditure in respect of the mine, the names of the shareholders, their accounts with the mine, and transfers of the shares, are entered in a book called the "cost-book." The rules and regulations of the company (if any) formerly had to be registered at the office of the registrar of the Court of the Vice-warden of the Stannaries.[1] The Stannaries Court was abolished in 1896, and the jurisdiction transferred to the County Courts.[2]

Stannaries Court.

Transfers of shares are usually effected by a document signed by the transferor or transferee, by which the former acknowledges that he has made, and the latter that he has accepted, a transfer of the shares mentioned. This document is addressed to the purser, and on being sent to him is sufficient authority to him to register the transferee as a shareholder.[3]

Transfer of shares in.

A cost-book mining company may sue for unpaid calls in the name of the purser as nominal plaintiff for the company.[4]

Calls.

(2) By an Act called the Chartered Companies Act, 1837,[5] power was given to the Crown to grant by letters patent "to any company or body of persons associated together for any trading or other purposes whatsoever, and to the heirs, executors, administrators, and assigns of any such persons, although not incorporated by such letters patent, any privilege or privileges which, according to the rules of the common law, it would be competent to Her Majesty, her heirs and successors, to grant to any such company or body of persons in and by any charter of incorporation."

Companies under the Chartered Companies Act, 1837.

It was also provided that the letters patent so granted might declare that all suits and proceedings by or against the company should be carried on in the name of, or against one of, the two officers appointed to sue and be sued on behalf of the company;[6] that the individual liability of members of the company might be limited by the letters patent to such extent per share as should

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[1] 32 & 33 Vict. c. 19, s. 9; as to the duty of the purser to make entries in the cost book, see the Stannaries Act, 1887 (50 & 51 Vict. c. 43, s. 23). The office of the registrar has been abolished by order of the Board of Trade, March 22nd, 1897. See *London Gazette*, March 23rd, 1897, p. 1677.

[2] Stannaries Court Act, 1896 (59 & 60 Vict. c. 45, s. 1), and order of the Lord Chancellor made thereunder on Dec. 16th, 1896; W. N. 1897 (Jan.), p. 43.

[3] *Toll* v. *Lee*, 4 Ex. 230. Probably a transfer by parol is sufficient: *Walker* v. *Bartlett*, 18 C. B. 845.

[4] Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 13; *Re Nance*, [1893] 1 Q. B. 590.

[5] 7 Will. 4 & 1 Vict. c. 73, s. 2.

[6] *Ib.* s. 3.

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be declared in the letters patent;[1] that every such company should be entered into by a deed of partnership or agreement in writing, in which the number of shares should be specified, also the names or styles of the company and of its members, its business, and the principal or only place of carrying it on;[2] that, on the transfer by deed or writing of any share, notice in writing should be given to the company by the transferee;[3] that, no transferee should be entitled to recover any share in the profits until the transfer should be registered;[4] that a person ceasing to be a member should continue liable as a member until a return of the transfer or other fact whereby he ceased to be a member should be registered;[5] that judgments against the officer of the company might be enforced against past and present members, but, in case the liability of the members was restricted, only as against any member to the amount remaining unpaid on his share.[6]

Companies incorporated under special Acts.

(3) Where a company is incorporated by a special Act of Parliament, the members of the company are not partners, and their liability in respect of the debts of the company depends upon the provisions of the special Act. In the absence of express provision, as we have observed above, the members are not personally liable for the debts of the company, except in respect of moneys unpaid on their shares.[7] It is the practice to incorporate the Companies Clauses Consolidation Acts, 1845 to 1889[8] (sometimes with variations or exceptions), in the special Act.

Companies Clauses Consolidation Act, 1845.

The Companies Clauses Consolidation Act, 1845, assumes that the company is incorporated by a special Act by which the amount of nominal capital and the number and amounts of the shares are prescribed. The Act provides that the shares are to be numbered regularly from one upwards, so that each share shall be distinguished by its own number.[9] The company is to keep a book called the "Register of Shareholders," authenticated by the common seal of the company,[10] containing the names and additions[11] of the shareholders, the number of shares to which each is

Register of shareholders.

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[1] 7 Will. 4 & 1 Vict. c. 73, s. 4.
[2] S. 5.
[3] S. 9.
[4] S. 20.
[5] S. 21.
[6] S. 24.
[7] See *post*, p. 268.
[8] 8 & 9 Vict. c. 16; 26 & 27 Vict. c. 118; 32 & 33 Vict. c. 48; 51 & 52 Vict. c. 48; and 52 & 53 Vict. c. 37.
[9] Act of 1845, s. 6.
[10] Where the register is contained in several volumes, it suffices if the seal is affixed to the last of them only; *Knight* v. *G. N. R. Co.*, 1 Macq. 112.
[11] Elph. Introd. 61.

entitled, the distinguishing numbers of the shares and the amount of the subscriptions paid on them.[1] The register of shareholders is *primâ facie* evidence against a person registered in it as a shareholder that he is such in fact.[2] On demand of any shareholder, and on payment of a small fee, the company is required to deliver to him a certificate of membership, which is *primâ facie* evidence of his legal[3] title to the shares mentioned in it.[4] By issuing a certificate, the company may be estopped from denying the title of the person therein named to the shares.[5]

Register not conclusive.

It should be observed that a person may be a shareholder though his name be not on the register of shareholders, as where the special Act names him as a director and requires each director to hold shares;[6] and that if the name of a person is improperly put on the register, the onus lies on him of showing that he is not a shareholder, which he can do by showing that his name was placed on the register without his express or implied authority.[7] On the one hand, a person who is bound to accept shares may be registered as a shareholder,[8] and, on the other hand, a person whose name is registered as a shareholder does not become a shareholder unless he is also entitled to a share in the company.[9] But, where a person has been put on the register, the company have no right to strike him off unless they can show proper grounds for so doing.[10]

Where the register is incorrect, the company can be compelled by mandamus or injunction respectively to insert the name of a person who has a right to be on the register,[11] or to strike out the name of a person who has been improperly placed on it.[12]

Transfer of shares.

The shares are transferable by deed, which may be in the form prescribed by the Act or to the like effect, and must be delivered to the secretary of the company,[13] who keeps it and enters a

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[1] Act of 1845, s. 9.

[2] *Ib.* s. 28.

[3] *Shropshire Union R. Co.* v. *Reg.*, L. R. 7 H. L. 496.

[4] Act of 1845, ss. 11, 12.

[5] *Tomkinson* v. *Balkis Co.*, [1891] 2 Q. B. 614.

[6] *Portal* v. *Emmens*, 1 C. P. D. 201, 664; *Isaacs' Case*, [1892] 2 Ch. 158; see *Wolverhampton Water Co.* v. *Hawkesford* 6 C. B. N. S. 336, 7 *ib.* 795, and 11 *ib.* 456; *Re S. London Fish Market Co.*, 39 Ch. D. 324, 337; *post*, p. 284.

[7] Lindley on Companies, 106.

[8] *Midland Great Western R. Co.* v. *Gordon*, 16 M. & W. 804.

[9] Lindley on Companies, 107.

[10] *Ward* v. *S. E. R. Co.*, 2 E. & E. 812.

[11] *Reg.* v. *Shropshire Union R. Co.*, L. R. 8 Q. B. 420.

[12] *Eustace* v. *Dublin Trunk Connecting R. Co.*, 6 Eq. 182.

[13] *Nanney* v. *Morgan*, 37 Ch. D. 346; *Roots* v. *Williamson*, 38 Ch. D. 485, 494.

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memorial in a book called "the Register of Transfers."[1] In cases where the interest in any share is transmitted owing to the death or bankruptcy of a shareholder (formerly by the marriage of a female shareholder), or by any other lawful means, the transmission is to be authenticated by a declaration made in the prescribed manner and left with the secretary, who is to enter the name of the person entitled by such transmission on the register of shareholders.[2]

Trusts.

The company is not bound to see to the execution of any trust, whether express, implied or constructive, to which any of the shares may be subject.[3]

Issue of fully-paid stock.

It should be noted that companies to which the Companies Clauses Acts of 1863 and 1869[4] are applicable, may issue fully paid-up stock or shares at a discount for cash or other consideration, though the directors may be personally liable if they do so without necessity.[5]

Remedy of creditors of company.

The creditors of a company governed by the Companies Clauses Acts are not entitled to proceed against the shareholders personally if payment can be obtained from the company.[6]

Where execution is issued against the property of the company, and "there cannot be found sufficient[7] whereon to levy such execution," execution may be issued against any shareholder to the amount unpaid on his shares,[8] even though he is not registered as a shareholder,[9] on the creditor obtaining a *scire facias*[10] or leave to issue execution.[11]

The Companies Acts, 1862 to 1898.

(4) Companies incorporated under special Acts, and regulated, as above described, by the Companies Clauses Acts, must be carefully distinguished from joint stock companies incorporated by registration under the Companies Act, 1862, and regulated by that Act and subsequent Acts, which we now proceed to consider.

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[1] Act of 1845, ss. 14, 15; *Nanney* v. *Morgan*, 37 Ch. D. 346.

[2] Act of 1845, ss. 18, 19. See as to the position of executors or administrators of a shareholder, *Barton* v. *N. Staffordshire R. Co.*, 38 Ch. D. 458; *Barton* v. *L. & N. W. R. Co.*, 24 Q. B. D. 77.

[3] Act of 1845, s. 20.

[4] 27 & 28 Vict. c. 118, s. 21; 32 & 33 Vict. c. 48, ss. 5, 6, 7.

[5] *Webb* v. *Shropshire R. Co.*, [1893] 3 Ch. 307, 329.

[6] Lindley on Companies, 290.

[7] *Rastrick* v. *Derbyshire R. Co.*, 9 Ex. 149.

[8] 8 & 9 Vict. c. 16, s. 36. Lindley on Companies, 290.

[9] *Portal* v. *Emmens*, 1 C. P. D. 201, 664. *Ante*, p. 267.

[10] *Hitchins* v. *Kilkenny, &c. R. Co.*, 10 C. B. 160. As to *scire facias*, see *ante*, p. 260.

[11] R. S. C. Ord. XLII. r. 23.

The Companies Act, 1862,[1], repealed the Joint Stock Companies Act, 1844,[2] and fifteen other Acts passed in that and subsequent years for the regulation and winding-up of joint stock companies, including banking companies.[3] It has been amended by the Companies Act, 1867,[4] the Joint Stock Companies Arrangement Act, 1870,[5] the Companies Act, 1877,[6] the Companies Act, 1879,[7] the Companies Act, 1880,[8] the Companies Act, 1883,[9] the Companies Act, 1886,[10] the Preferential Payments in Bankruptcy Act, 1888,[11] the Companies (Memorandum of Association) Act, 1890,[12] the Companies (Winding-up) Act, 1890,[13] the Directors' Liability Act, 1890,[14] the Companies (Winding-up) Act, 1893,[15] the Preferential Payments in Bankruptcy Act Amendment Act, 1897,[16] and the Companies Act, 1898.[17] These Acts are generally referred to as the Companies Acts, 1862 to 1898.

Registration necessary.

The Companies Act, 1862,[18] forbids the formation of a company, association, or partnership, consisting of more than ten persons, for the purpose of carrying on the business of banking, and of more than twenty for the purpose of carrying on any other business for gain, unless it is registered under that Act, or incorporated by Act of Parliament or letters patent, or is a mining company within the Stannaries.

Object of the Acts.

"The Act was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed."[19] "The object of the Act was that commercial associations or companies

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[1] 25 & 26 Vict. c. 89.

[2] *Ante*, p. 260.

[3] 25 & 26 Vict. c. 89, s. 205, Sched. III.

[4] 30 & 31 Vict. c. 131.

[5] 33 & 34 Vict. c. 104.

[6] 40 & 41 Vict. c. 26.

[7] 42 & 43 Vict. c. 76.

[8] 43 Vict. c. 19.

[9] 46 & 47 Vict. c. 28.

[10] 49 & 50 Vict. c. 23.

[11] 51 & 52 Vict. c. 62.

[12] 53 & 54 Vict. c. 62.

[13] 53 & 54 Vict. c. 63.

[14] 53 & 54 Vict. c. 64.

[15] 56 & 57 Vict. c. 58.

[16] 60 Vict. c. 19.

[17] 61 & 62 Vict. c. 26.

[18] 25 & 26 Vict. c. 89, s. 4. See *R.* v. *Tankard*, [1894] 1 Q. B. 548. Insurance companies are also regulated by the Life Assurance Companies Acts, 1870 to 1872 (33 & 34 Vict. c. 61; 34 & 35 Vict. c. 58; 35 & 36 Vict. c. 41).

[19] *Per* James, L.J., *Smith* v. *Anderson*, 15 Ch. D. 273; see *Crowther* v. *Thorley*, 50 L. T. 43; *Re Siddall*, 29 Ch. D. 1; and, for examples of illegal associations, *Jennings* v. *Hammond*, 9 Q. B. D. 225; *Shaw* v. *Benson*, 11 Q. B. D. 563.

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consisting of more than twenty members should be registered,"[1] and to clothe a large partnership with something in the shape of a corporate capacity.[2]

Companies to which Acts apply.

The Act applies not only to companies formed under it,[3] but also, in part, to companies existing before the Act which were formed or registered under the repealed Joint Stock Companies Acts,[4] or formed in pursuance of letters patent or of Acts of Parliament, or working mines in the Stannaries jurisdiction, or otherwise duly constituted by law, and, as regards winding-up, may apply to any partnership, association, or company (except railway companies incorporated by Act of Parliament), consisting of more than seven members, and not registered under the Act.[5] Any company capable of being registered under the Act may be registered for the purpose of being wound up.[6]

Memorandum of association.

Under the Act seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and registering it (and also the articles of association, if any), form an incorporated company with or without limited liability.[7] The memorandum must contain the prescribed statements,[8] of which the most important are the objects for which the company is to be established, for thereby are its powers limited,[9] and whether the liability of its members is limited, and to what extent.[10]

Registration.

Upon registration being duly made, the registrar of joint stock companies certifies that the company is incorporated, and in the case of a limited company that the company is limited, and thereupon the subscribers of the memorandum of association, together with such other persons as from time to time become members of the company, become a body corporate by the name contained in

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[1] *Per* Jessel, M.R., *Re Padstow Assocn.*, 20 Ch. D. 145.

[2] *Per* Giffard, L.J., *Re General Co. of Land Credit*, 5 Ch. 377.

[3] See Parts I. to IV. of the Act of 1862.

[4] Part VI. of Act of 1862.

[5] Act of 1862, Part VIII., ss. 199—204.

[6] *Ib.* s. 180; *Re Northumberland Bank*, 2 De G. & J. 357; *Liverpool Bank* v. *Mellor*, 3 H. & N. 551 (both cases on the repealed Acts). See *Reg.* v. *Registrar of Joint Stock Companies*, [1891] 2 Q. B. 598.

[7] Act of 1862, ss. 6, 17, 18.

[8] *Ib.* ss. 8, 9, 10.

[9] See *per* Ld. Cairns in *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 668; *Ashbury* v. *Watson*, 30 Ch. D. 376. But this is now subject to the powers of alteration in the memorandum given by the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62). See *post*, p. 276.

[10] Act of 1862, ss. 8, 9, 10.

the memorandum, having perpetual succession and a common seal,[1] with power to hold lands.[2]

The certificate of the registrar is conclusive evidence that all the requisitions of the Act in respect of registration have been complied with;[3] but not, it would seem, that the company is one to which the Act applies.[4]

"One man company."

If the requirements of the statute have been complied with, the company becomes a valid legal corporation having a legal existence apart from the individual shareholders; and this is so, although there may be but seven shareholders, all members of one family, and the company has been formed for the purpose of taking over and carrying on the business of one of the seven shareholders who holds nearly all the shares.[5]

Liability of members.

The extent of the liability of the members of a company under the Act must be defined by the memorandum. It may be unlimited, in which case the company is called an unlimited company, or it may be limited either to the amount, if any, unpaid on the shares, when it is called a company limited by shares, or to such amount as the members may undertake by the memorandum to contribute to the assets of the company in the event of its being wound up,[6] in which case it is called a company "limited by guarantee." No company having the liability of its members limited by letters patent or Act of Parliament can register as an unlimited company, or as a company limited by guarantee;[7] nor can any company whose capital is not divided into shares of a fixed amount, or held and transferable as stock.[8] It should be added that an unlimited company may limit its liability on a contract by expressly stipulating that the funds only of the company shall be answerable, and that no member shall be liable beyond the

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[1] As to the seal, see Act of 1862, ss. 41, 42, 55; and 27 & 28 Vict. c. 19 (the Companies Seals Act, 1864), enabling companies to have official seals for use in business in foreign countries. As to a seal affixed without authority, see *Staple of England* v. *Bank of England*, 21 Q. B. D. 160.

[2] Act of 1862, s. 18. As to the effect of incorporation, see *per* Lindley, L.J., in *Ryhope Co.* v. *Foyer*, 7 Q. B. D. 498.

[3] Act of 1862, s. 18. See *Oakes* v. *Turquand*, L. R. 2 H. L. 354.

[4] *Re National Debenture Corp.*, [1891] 2 Ch. 505, 517; *Re Northumberland Bank*, 2 De G. & J. 357. But see *Peel's Case*, 2 Ch. 674; *Re Laxon*, [1892] 3 Ch. 555.

[5] *Salomon* v. *Salomon & Co.*, [1897] A. C. 22.

[6] Act of 1862, s. 7; see s. 38.

[7] *Ib.* s. 179 (i). See *Atkins* v. *Wardle*, 58 L. J. Q. B. 377.

[8] *Ib.* s. 181.

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amount of his share; and that an unlimited company may register as a limited company.[1]

By the Companies Act, 1867, it has been provided that, in cases where the liability of the members is limited, that of the directors or managers, or managing director, may be unlimited.[2]

Companies not formed for gain.

By the same Act any association about to be formed as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association, in promoting its objects, and to prohibit the payment of any dividend to the members of the association, may be registered with limited liability without the addition of the word "limited" to its name.[3]

Prohibition against carrying on business with less than seven members.

If a company carries on business when the number of its members is less than seven for a period of six months after the number has been so reduced, every person who is a member of the company during the time that it carries on business after such period of six months, and is cognizant of the fact that it is so carrying on the business with fewer than seven members, will be severally liable and may be separately sued for the payment of the whole debts of the company contracted during such time.[4]

Articles of association.

In the case of a company limited by shares, the memorandum of association may be, and, in the case of a company limited by guarantee or unlimited, it must be, accompanied by articles of association signed by the subscribers to the memorandum, prescribing regulations for the company.[5] In the former case, if the memorandum is not accompanied by articles, or in so far as the articles do not exclude or modify the regulations in Table A. in the first schedule to the Act of 1862, such regulations, so far as applicable, are to be the regulations of the company.[6]

The function of the articles of association is to regulate the administration and internal affairs of the company.

The memorandum of association "is, as it were, the charter, and defines the limitation of the powers of the company. With regard to the articles of association, these articles play a part subsidiary to the memorandum. They accept the memorandum of association as the

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[1] Act of 1879 (42 & 43 Vict. c. 76); and see Act of 1862, ss. 179, 180.
[2] 30 & 31 Vict. c. 131, ss. 4—8.
[3] *Ib.* s. 23.
[4] Act of 1862, s. 48.
[5] *Ib.* s. 14.
[6] *Ib.* s. 15.

charter of the company, and, so accepting it, the articles proceed to define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made."[1]

In respect of all matters which the Act requires to be in the memorandum, the articles cannot be looked at in order to modify the memorandum which is the dominant instrument.[2] In respect, however, of matters not required by law to be stated in the memorandum, the memorandum and articles, being contemporaneous documents, may be read together; and, if they can be read in two ways, the construction will be preferred which renders them consistent, and if one is clear and the other ambiguous, the first will be used to interpret the second.[3]

Resolutions

As to matters within the powers of the company, the company is, generally speaking, bound by an ordinary resolution of a majority of members present at a duly convened meeting;[4] and an ordinary resolution may be that of a simple majority of those present, unless the regulations of the company prescribe otherwise. In some cases, either by statute or under the articles of association, "extraordinary" or "special" resolutions are necessary.

"Special resolution."

A special resolution is one passed by a majority of not less than three-fourths of the members present in person or by proxy at a meeting, and confirmed by a simple majority at a subsequent meeting held not less than fourteen days nor more than one month after the first meeting.[5]

Extraordinary resolution.

An "extraordinary" resolution is a resolution which is passed in such a manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution.[6]

Alteration of articles

The regulations or articles of association may, subject to the provisions of the Act and of the memorandum, be altered or added to by special resolution.[7] Thus a company may by special resolu-

[1] *Per* Ld. Cairns, *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 668; and see *Guinness* v. *Land Corp. of Ireland*, 22 Ch. D. 349.

[2] *Per* Bowen, L.J., *Guinness* v. *Land Corp. of Ireland*, 22 Ch. D. 381.

[3] *Per* Jessel, M. R., *Re Phœnix, &c. Steel Co.*, 44 L. J. Ch. 683; *Re Pyle Works*, 44 Ch. D. 534.

[4] *N. W. Transportation Co.* v. *Beatty*, 12 App. Cas. 593.

[5] Act of 1862, s. 51.

[6] S. 129.

[7] S. 50. *Malleson* v. *Nat. Insurance Corp.*, [1894] 1 Ch. 200. See *James* v. *Buena Ventura Co.*, [1896] 1 Ch. 456.

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tion alter its articles so as to enable the directors to increase capital by issuing preference shares, though neither the articles or memorandum authorize any preference among shareholders.[1]

Directors.

Ordinary administrative matters are transacted by the directors.[2] If they exceed their authority their acts may be ratified by a majority of the members of the company,[3] on the ground that in matters of internal management the proper tribunal to decide disputes is a general meeting of the shareholders. But if acts of the directors are *ultra vires* of the company itself, they do not bind the company, and the unanimous consent of all the members cannot validate them, and any one dissentient shareholder may take proceedings to restrain such acts.[4]

Breach of trust by directors.

Directors are in some respects in the position of trustees for the company,[5] and may be made liable for any loss accruing to the company through any breach of their trust.[6] Under the Companies (Winding-up) Act, 1890,[7] a director or other officer of a company which is being wound up may be ordered by the Court to repay money or restore property which he has misapplied or retained, or for which he has become liable or accountable.[8]

Actions by shareholders against directors or company.

The rule is that nothing connected with internal disputes between the shareholders is to be made the subject of an action by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there be something *ultra vires* on the part of the company *quâ* company, or on the part of the majority of the company, so that they are not fit persons to determine it;[9] but that every litigation must be in the name of the company if the company really desire it,[9] subject to certain exceptions, as where a fraud is committed by persons who

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[1] *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361, overruling *Hutton* v. *Scarboro' Hotel Co.*, 2 Dr. & Sm. 521. See *British and American Corp.* v. *Couper*, [1894] A. C. 399, 417.

[2] Lindley on Companies, 155.

[3] See *Foss* v. *Harbottle*, 2 Hare, 461; *Re London Investment Corp.*, [1895] 2 Ch. 860.

[4] *Salomons* v. *Laing*, 12 Beav. 339; *Hope* v. *International Soc.*, 4 Ch. D. 327; *Hoole* v. *G. W. R. Co.*, 3 Ch. 262. See notes to *Collins* v. *Blantern*, 1 Sm. L. C. 377—381.

[5] *Re Faure Electric Co.*, 40 Ch. D. 141; *Sheffield Society* v. *Aizlewood*, 44 Ch. D. 452; *Re Sharpe*, [1892] 1 Ch. 154. See *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589.

[6] *Re Sharpe, sup.*; *Re Lands Allot. Co.*, [1894] 1 Ch. 616; *Hirsche* v. *Sims*, [1894] A. C. 654.

[7] 53 & 54 Vict. c. 63, s. 10.

[8] See *Re New Mashonaland Co.*, [1892] 3 Ch. 577; *Re Kingston Co.* (No. 2), [1896] 1 Ch. 331. See *post*, p. 287.

[9] *Per* James, L. J., *MacDougall* v. *Gardiner*, 1 Ch. D. 13, 21.

can command a majority of votes, in which case the minority can sue.[1]

Shares. Transfers.

The shares or other interest of any member are personal estate, transferable as provided by the regulations of the company; and each share, where the capital is divided into shares, must be distinguished by its appropriate number.[2] The names of every member must be registered.[3] It will be observed that transfer is not, as under the Companies Clauses Consolidation Act, required to be by deed.[4]

The following are the regulations in Table A. of the Act of 1862 as to transfer:—

> Art. 8. "The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof."
>
> Art. 10. "The company may decline to register any transfer of shares made by a member who is indebted to them."[5]

The directors of a company are entitled to a reasonable time for considering every transfer before they register it.[6] They may refuse to register a transfer without giving reasons if they act *bonâ fide*.[7]

Estoppel.

If a company registers a forged transfer, it can be compelled to re-register the true owner of the shares;[8] and the company may be liable to compensate the innocent transferee if he has altered his position on the faith of a certificate issued to him.[9] The company will be estopped from denying the title of a transferee from a person to whom it has issued a share certificate, and will be liable in damages for refusal to register such transferee.[10]

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[1] *Per* Jessel, M.R., *Mason* v. *Harris*, 11 Ch. D. 107; *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

[2] Act of 1862, s. 22; and see s. 24. See, as to the rights of the transferee, *Société Générale* v. *Tramways Union Co.*, 14 Q. B. D. 451, *per* Lindley, L.J.

[3] Act of 1862, ss. 23, 25, 26, 35; and see 30 & 31 Vict. c. 131, s. 26.

[4] See *ante*, p. 267.

[5] As to the sufficiency of this, see Buckley's Companies Acts, 493; and Palmer's Company Precedents, vol. 1, 400. As to priorities between several persons claiming title to shares registered in the name of a third person, see *Moore* v. *North Western Bk.*, [1891] 2 Ch. 599.

[6] *Re Ottos Co.*, [1893] 1 Ch. 618.

[7] *Re Coalport China Co.*, [1895] 2 Ch. 404.

[8] *Barton* v. *L. & N. W. R. Co.*, 38 Ch. D. 144, 149.

[9] *Tomkinson* v. *Balkis Co.*, [1891] 2 Q. B. 614; [1893] A. C. 396.

[10] *Re Ottos Co.*, *sup.*

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Forged Transfers Acts.

By the Forged Transfers Acts, 1891 and 1892,[1] a company has power to pay compensation out of its funds for any loss arising from a transfer of shares in pursuance of a forged transfer.

Leeman's Act, 1867.

In order to prevent contracts for the sale and purchase of shares and stock in joint stock banking companies, of which the sellers are not possessed, or over which they have no control, an Act, commonly called Leeman's Act, was passed in 1867,[2] making void all such contracts which do not specify the distinguishing numbers of such shares or stock, or, if there are no distinguishing numbers, the person or persons in whose name or names the same then stand registered. Dealers on the Stock Exchange have disregarded this Act as impracticable, at the risk of incurring personal liability; but it has been held that the usage of the Stock Exchange to disregard the Act is unreasonable, and not binding on strangers who do not know of such usage;[3] and, by disregarding the Act, a stockbroker may render himself liable for a breach of duty in not making a valid contract.[4]

Alteration of capital or name.

If authorized by its regulations as originally framed, or as altered by special resolution,[5] any company limited by shares may modify the conditions contained in its memorandum of association, so as to increase its capital by the issue of new shares, or to consolidate and divide its capital into shares of larger amount, or to convert its paid-up shares into stock, or, subject to the approbation of the Board of Trade, to change its name.[6] Under the Acts of 1867 and 1877,[7] such companies may reduce their capital, subject, except in the case of a reduction by cancellation of unissued shares,[8] to confirmation by the Court; and under the Act of 1867 they may divide their capital or any part of it into shares of smaller amount than is fixed by the memorandum of association.[9]

Companies (Memorandum of Association) Act, 1890.

The Companies (Memorandum of Association) Act, 1890,[10] enables a company registered under the Companies Acts to alter its memorandum of association (or deed of settlement) by a special

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[1] 54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36.

[2] 30 & 31 Vict. c. 29.

[3] *Perry* v. *Barnett*, 15 Q. B. D. 388; *Seymour* v. *Bridge*, 14 Q. B. D. 460. See *Loring* v. *Davis*, 32 Ch. D. 625.

[4] *Neilson* v. *James*, 9 Q. B. D. 546.

[5] Act of 1862, ss. 50, 51.

[6] *Ib.* ss. 12, 13.

[7] 30 & 31 Vict. c. 131, ss. 9—20; and 40 & 41 Vict. c. 26. See *Bannatyne* v. *Direct Spanish Co.*, 34 Ch. D. 287; *Re Direct Spanish Co.*, *ib.* 307; *Re Pinkney Co.*, [1892] 3 Ch. 125; *British and American Corp.* v. *Couper*, [1894] A. C. 399; *Re Colmer*, [1897] 1 Ch. 524.

[8] 40 & 41 Vict. c. 26, s. 5.

[9] Act of 1867, ss. 21, 22.

[10] 53 & 54 Vict. c. 62.

resolution, subject to confirmation by an order of the Court. Alterations may be made with respect to the objects of the company, so as to carry on its business more economically or more efficiently; or to attain its main purpose by new or improved means; or to enlarge or change the local area of its operations; or to carry on some business which may conveniently or advantageously be combined with the business of the company; or to restrict or abandon any of its objects.[1]

Calls.

The Act of 1862 does not provide for the making of calls; that is left to the articles of association or regulations of the company.[2] The power to make calls may be vested in a general meeting of the company; but it is usually given to a quorum of the directors. By the Act of 1867,[3] a company may, if authorized by its regulations as originally framed or as altered by special resolution, arrange, on the issue of shares, for a difference between the holders of such shares in the amount and time of payment of calls; and may accept payment in advance of calls, and pay dividends on such payments.[4]

The general effect of the Companies Acts[5] is to render each member liable to pay the full amount of his shares, and, in the case of unlimited companies and companies limited by guarantee, a further sum in the event of a winding-up, but only in that event. This liability is in the nature of a specialty debt due to the company, accruing in respect of each share held from the time of its acquisition, and it is a liability which, in the case of limited companies, can only be discharged by payment in cash, unless an agreement to the contrary is duly registered.[5]

It was decided that, under the Act of 1862, shares might be fully paid up in money's worth as well as in cash; but the Act of 1867[6] provided, by an important section which has been the subject of much discussion,—

Contracts to

"That every share in any company shall be deemed and taken

[1] For observations on this Act, see *Re Governments Stock Co.*, [1891] 1 Ch. 649; and for instances of its application, see *Re Foreign and Colonial Co.*, [1891] 2 Ch. 395; *Re Indian Extracting Co.*, [1891] 3 Ch. 538; *Re Alliance Marine Co.*, [1892] 1 Ch. 300; *Re Reversionary Soc.*, [1892] 1 Ch. 615; *Re Governments Stock Co.* (No. 2), [1892] 1 Ch. 597; *Re National Boiler Co.*, [1892] 1 Ch. 306.

[2] See Table A. (4)—(7).

[3] S. 24.

[4] *Re Washington Co.*, [1893] 3 Ch. 95; *Lock* v. *Queensland Co.*, [1896] A. C. 461.

[5] Act of 1862, ss. 7, 9 (4), 16, 38, 75, 101, 102; Act of 1867, s. 25. *Per* Lindley, L.J., *Re Pyle Works*, 44 Ch. D. 582.

[6] S. 25.

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issue shares as paid up. 30 & 31 Vict. c. 131, s. 25.

to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same[1] shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares."[2]

Thus it can be ascertained by reference to the filed contracts how much of the capital has been issued for some consideration other than cash or a liability to pay cash, as, for example, where shares are issued as paid up to a vendor as the price of property sold to the company,[3] or to a person in payment for services rendered to the company.[4] If the contract be duly registered, "not only may a share be allotted as fully paid up in respect of property, goods, or services received by the company, but the Courts will not inquire into the adequacy of the consideration, and have not required it to be proved that the consideration given was equivalent in cash value to the nominal amount of the share."[5]

Issue of shares at discount.

A company limited by shares cannot issue shares, as fully paid up, at a discount, even though authorized by the articles of association.[6] The whole nominal amount must be paid either in money or money's worth.[7] If shares are issued at a discount, the shareholder will be liable to pay the amount of the discount.[7]

The contract which is filed must itself contain a statement of the actual consideration given for the shares.[8] Payment in cash means something which, in an action for the calls, would sustain a plea of payment and not merely a plea of accord and satisfaction.[9]

Relief when contract not filed.

By the Companies Act, 1898,[10] the Court may grant relief, where a contract has not been filed, if the omission to file was

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[1] *I.e.*, terms of payment; *per* Fry, L.J., *Re Almada Co.*, 38 Ch. D. 425.

[2] See *Re Delta Syndicate*, 30 Ch. D. 153. As to what is a sufficient contract in writing, see *Re New Eberhardt Co.*, 43 Ch. D. 118; *Elsner's Case*, [1895] 2 Ch. 759.

[3] *Spargo's Case*, 8 Ch. 407.

[4] See *per* James, L.J., in *Crickmer's Case*, 10 Ch. 614; *per* Cotton, L.J., *Re Almada Co.*, 38 Ch. D. 422; and see *Ooregum Co.* v. *Roper*, [1892] A. C. 125.

[5] *Per* Ld. Herschell in *Ooregum Co.* v. *Roper*, [1892] A. C. 125, 140; *Re Almada Co.*, 38 Ch. D. 423, *per* Cotton, L.J.; *Re Wragg Co.*, [1897] 1 Ch. 796.

[6] *Welton* v. *Saffery*, [1897] A. C. 299.

[7] *Ooregum Co.* v. *Roper*, [1892] A. C. 125; *Re Addlestone Co.*, 37 Ch. D. 191, 204; *Re Eddystone Co.*, [1893] 3 Ch. 9; *Welton* v. *Saffery*, *supra*.

[8] *Re Kharaskhoma Co.*, [1897] 2 Ch. 451; *Re Maynards*, [1898] 1 Ch. 515.

[9] *White's Case*, 12 Ch. D. 511; *Re Johannesburg Hotel Co.*, [1891] 1 Ch. 119; Lindley on Companies, 785 *et seq.* For instances, see Buckley on Companies, 600.

[10] 61 & 62 Vict. c. 26.

accidental or inadvertent, or if it is just and equitable to grant such relief.

The Act of 1879[1] provides that a limited company may, by special resolution, declare that any portion of its capital, which has not been already called up, shall not be called up except in the event of and for the purpose of the company being wound up.

Notice of increase of capital.

Notice of increase of capital,[2] also of its consolidation, division, or conversion, must be given to the registrar.[3]

Share warrants.

Under the Companies Act, 1867,[4] if authorized by its regulations as originally framed, or as altered by special resolution, a company limited by shares may, with respect to any fully paid-up share or stock, issue under their seal a share warrant to bearer, that is to say, a warrant transferable by delivery, stating that the bearer of the warrant is entitled to the share or shares or stock therein specified, and may provide by coupons or otherwise for the payment of the dividends thereon. Such a warrant entitles the bearer to the shares or stock specified in it, which may be transferred by the delivery of the warrant; and he is entitled to be registered as a member;[5] but he is not a member of the company unless, and only so far as, it is so provided by the articles.[6]

Trusts.

No notice of any trust, expressed, implied, or constructive, is to be entered on the register or be receivable by the registrar.[7]

Certificate—evidence of membership.

A certificate under the common seal of the company, specifying any share or shares or stock held by any member, is *primâ facie* evidence of such member's title.[8]

Winding-up and dissolution of companies.

With regard to the winding up of incorporated companies, it must be borne in mind that at common law a corporation cannot be dissolved by the will of all its members, but only by the surrender or cancellation of its charter, or in such other way as may be prescribed by the Act of Parliament or other instrument under which it is constituted, or by a special Act of Parliament, or by the total loss of all its members.[9]

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[1] 42 & 43 Vict. c. 76, s. 5.

[2] Act of 1862, s. 34.

[3] *Ib.* s. 28. See s. 29.

[4] Act of 1867, ss. 27, 28.

[5] *Ib.* s. 29.

[6] *Ib.* ss. 30—32.

[7] Act of 1862, s. 30. See *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424; 11 App. Cas. 20; *Bradford Bank* v. *Briggs*, 12 App. Cas. 29.

[8] Act of 1862, s. 31. As to estoppel by issue of certificate, see *ante*, p. 275. See Table A. (2).

[9] See Lindley on Companies, 609;

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The main objects of the modern enactments as to winding-up proceedings are to provide a method of effecting the dissolution of the company, and the due application of its assets in payment of its debts, and to compel the members to contribute such sums as may be required for that purpose, and for the adjustment of the rights of the members *inter se*. Under the former Winding-up Acts, referred to above, creditors might obtain payment of their debts by proceedings in bankruptcy against insolvent companies,[1] and shareholders could institute winding-up proceedings by petition to the Court of Chancery,[2] in order to have the assets got in and applied in payment of debts, and any deficiency supplied by contribution among themselves. But these Acts still allowed creditors to sue the shareholders individually, and did not provide for a voluntary winding-up by the shareholders themselves without the intervention of the Court, or for a winding-up order on the application of a creditor.[3]

Remedy of creditor of company—*scire facias* or execution,

A creditor of an incorporated company has not as such any contract with the shareholders personally; but under the earlier Joint Stock Companies Acts, creditors of such a company were given a remedy by *scire facias* or execution against the shareholders personally;[4] and, under the Act of 1855,[5] creditors had the same remedy by execution against shareholders to the extent of the unpaid portion of their shares as creditors could use against shareholders of companies with unlimited liability under the former Acts of 1844, 1848, and 1849.[6] The first Act which enabled a creditor to become a party to the winding up of a company was the Act of 1856,[7] by which,[8] in lieu of the remedy by *scire facias* or execution against shareholders, it was provided that creditors, in default of payment by the company, should obtain payment only by means of a petition to wind up the company; and this is the remedy of the creditor under the Companies Acts, 1862—1898, now in force. The Act of 1856 provided that, in a winding-up, the shareholders were to contribute an amount sufficient to pay the

—winding-up petition.

Grant on Corporations, 296 *et seq.* It seems that parliamentary corporations cannot surrender, nor be allowed to die out; *ib.* 308.

[1] 7 & 8 Vict. c. 111.

[2] 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108.

[3] See Lindley on Companies, 611 *et seq.*, as to these Acts and their defects.

[4] *Ante*, pp. 152, 260, 267.

[5] 18 & 19 Vict. c. 133, s. 8.

[6] See *per* Ld. Chelmsford, *Oakes* v. *Turquand*, L. R. 2 H. L. 346, 360.

[7] 19 & 20 Vict. c. 47, s. 69.

[8] See 20 & 21 Vict. c. 78; 21 & 22 Vict. c. 60.

debts of the company and the expenses of the winding-up, but that, if the company was limited, no contribution should be required from any shareholder exceeding the amount (if any) unpaid on the shares held by him. The effect of these provisions was to change the remedy of the creditor, so that, instead of issuing execution against individual shareholders, he obtained satisfaction of his debt by means of forced contributions, either by compelling a winding up of the company or by becoming a party to a winding-up which had already been ordered. Thereupon the assets were called in and (subject to the rights of mortgagees) distributed among all the creditors rateably as in a bankruptcy. Winding-up on the petition of a creditor under the Companies Act, 1862, as under the Act of 1856, which it superseded, "is but a mode of enforcing payment. It closely resembles a bankruptcy, and a bankruptcy has been called, not improperly, a statutable execution for the benefit of all creditors."[1] By the Bankruptcy Act, 1883, incorporated companies cannot be made bankrupt.[2]

Railway companies.

A railway company, if a warrant for the abandonment of its whole railway has been granted, may be wound up under the Companies Act, 1862.[3] Whether a railway company can be registered under the Companies Acts and then be wound up, seems doubtful.[4]

Winding-up of unregistered companies.

Any partnership, association or company (except railway companies incorporated by Act of Parliament)[5] consisting of more than seven members, though not registered under the Companies Act, 1862, may be wound up under that Act.[6]

Effect of winding-up.

The primary intention of the legislature in the provisions relating to the winding up of companies under the Companies Acts is expressed in the Companies Act, 1862,[7] to be that "the property of the company shall be applied in the satisfaction of its

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[1] *Per* Ld. Cranworth, *Oakes* v. *Turquand*, L. R. 2 H. L. 363.

[2] 46 & 47 Vict. c. 52, s. 123. Apparently an unincorporated company might be adjudicated bankrupt; Lindley on Companies, 610.

[3] The Abandonment of Railways Acts, 1850 and 1869 (13 & 14 Vict. c. 83; 32 & 33 Vict. c. 114, s. 4).

[4] *Re Ennis R. Co.*, L. R. 3 Ir. 94.

[5] See *G. N. R. Co.* v. *Tahourdin*, 13 Q. B. D. 320; *Re Brentford Tram Co.*, 26 Ch. D. 527; *Re E. & W. I. Dock Co.*, 38 *ib.* 576.

[6] S. 199. See *Re Free Fishermen of Feversham*, 36 Ch. D. 329; *Re South London Market Co.*, 39 Ch. D. 324, 332. This includes companies incorporated by special Acts; *Re Isle of Wight Co.*, 2 H. & M. 597; *Re Barton Water Co.*, 42 Ch. D. 585; *Re Portsmouth Tramways Co.*, [1892] 2 Ch. 362.

[7] S. 133 (1).

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liabilities, *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed among the members according to their rights and interests in the company."[1] Crown debts,[2] however, and certain debts specified in the Preferential Payments in Bankruptcy Acts,[3] are entitled to priority.

By s. 10 of the Judicature Act, 1875, it is provided that in the winding up of every company whose assets may prove insufficient for the payment of its debts and liabilities and the costs of winding up, "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable . . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."[4]

A company may be wound up either (1) compulsorily by the Court;[5] or (2) voluntarily; or (3) subject to the supervision of the Court.

Winding-up by the Court.

A company may be wound up compulsorily by the Court under the following circumstances:—[6]

(1.) Whenever the company has passed a special resolution[7] requiring the company to be wound up by the Court:

(2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year:

(3.) Whenever the members are reduced in number to less than seven:

(4.) Whenever the company is unable to pay its debts:

(5.) Whenever the Court is of opinion that it is just and equitable that the company should be wound up.[8]

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[1] See as to the meaning of this, *Birch* v. *Cropper*, 14 App. Cas. 525.

[2] *Re Henley Co.*, 9 Ch. D. 469; *Re Oriental Bank*, 28 Ch. D. 643.

[3] 51 & 52 Vict. c. 62; 60 Vict. c. 19. *Post*, p. 317.

[4] 38 & 39 Vict. c. 77. See as to the rules in bankruptcy, *post*, Ch. XVIII.; and as to the case of secured creditors of a company, *Quartermaine's Case*, [1892] 1 Ch. 639; as to the position of mortgagees of a company which is being wound up, see *Re Pound*, 42 Ch. D. 402.

[5] That is the High Court of Justice, the Palatine Court, or the County Court; see the Companies Winding-up Act, 1890 (53 & 54 Vict. c. 63), repealing s. 81 of 25 & 26 Vict. c. 89.

[6] Act of 1862, s. 79. See Life Assurance Companies Amendment Act, 1872 (35 & 36 Vict. c. 41), s. 4.

[7] *Ante*, p. 273.

[8] See *Re Suburban Hotel Co.*, L. R. 2 Ch. 737. *E.g.*, where the whole *substratum* of the company has gone, or it becomes impossible to carry on its business; see *Re German Date Coffee Co.*, 20 Ch. D. 169; *Re Crown Bank*, 44 Ch. D. 634; *Re Pioneer Syndicate*, [1893] 1 Ch. 731; *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; *Re Brinsmead*, [1897] 1 Ch. 406; Lindley on Companies, 631.

Company unable to pay debts.

A company is deemed to be unable to pay its debts whenever a creditor (by assignment or otherwise) for an amount exceeding 50*l.* has served on the company a demand for payment, and the company has for three weeks after such service neglected to pay the debt or to secure or compound for it; or execution by a judgment creditor is returned unsatisfied; or it is proved to the satisfaction of the Court that the company is unable to pay its debts.[1]

Who may petition.

An application for a winding-up order is to be made by petition, which may be presented by the company itself, or by any one or more creditor or creditors, contributory or contributories, of the company.[2] For this purpose a shareholder who has paid up in full is a "contributory";[3] and a shareholder, the calls upon whose shares are in arrear, may, on certain terms, present a petition.[4] The right of a contributory to petition cannot be limited or excluded by the articles.[5] A debenture-holder may present a petition.[6]

Commencement of winding-up.

The winding-up is deemed to commence at the time of the presentation of the petition.[7] When a winding-up order has been made, no action or other proceeding can be brought or proceeded with against the company without the leave of the Court;[8] and dispositions of property of the company, or transfers of shares, made between the commencement of the winding-up and the winding-up order are void, unless the Court otherwise orders.[9]

Liquidators.

For the purpose of conducting the proceedings in winding-up and assisting the Court therein, a liquidator or liquidators may be appointed by the Court,[10] and until a liquidator is appointed, the official receiver attached to the Court for bankruptcy purposes is provisional liquidator.[11]

It should be noted that the property of the company does not vest in the liquidator, and therefore conveyances of it must be made by the liquidator in the name of the company and under its seal.[12]

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[1] Act of 1862, s. 80. See Act of 1867, s. 40.

[2] Act of 1862, s. 82; Lindley on Companies, 624.

[3] *Re National Savings Bank*, 1 Ch. 547.

[4] *Re Crystal Gold Co.*, [1892] 1 Ch. 408.

[5] *Re Peveril Gold Co.*, [1898] 1 Ch. 122.

[6] *Re Portsmouth Tramways Co.*, [1892] 2 Ch. 362.

[7] Act of 1862, s. 84; *Re Taurine Co.*, 25 Ch. D. 118; Lindley on Companies, 664.

[8] *Ib.* s. 87.

[9] *Ib.* s. 153; *Re Onward Bdg. Soc.*, [1891] 2 Q. B. 463.

[10] *Ib.* s. 92.

[11] Companies Winding-up Act, 1890 (53 & 54 Vict. c. 63), s. 4. See as to the powers of liquidators (subject to the sanction of the Court), Act of 1862, s. 95.

[12] Palmer, Comp. Prec., Vol. II., 652.

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"Contributory,"

The term "contributory" means every person liable, or alleged to be liable before the final determination of the list of contributories, to contribute to the assets of the company in the event of its being wound up;[1] and the persons so liable to contribute are[2] all present and past members of the company, subject to the qualifications[3] that:—

—past members.

(1.) No past member is so liable if he has ceased to be a member for one year or upwards prior to the commencement of the winding-up;

(2.) No past member is liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;

(3.) No past member is liable to contribute unless the existing members are unable to satisfy the contributions required to be made by them;

(4.) In the case of a company limited by shares, no contribution is to be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable, or in the case of a company limited by guarantee, exceeding the amount of the undertaking entered into on his behalf by the memorandum of association.

Members.

A "member" is a person who has agreed to become a member, and whose name is entered on the register of members.[4] Subscribers of the memorandum of association are deemed to have agreed to become members.[4]

Contributories.

Rectification of register.

Entry on the register is a condition precedent to liability as a member.[5] The list of contributories is settled by the Court, which has power to rectify the register by removing or inserting names.[6] For instance, the name of a director who is bound to take qualifying shares, but has not done so,[7] will be inserted, and the name of a person who has been induced to take shares as security upon the representation that they were "fully paid,"[8] or has taken them under a mistake as to the identity of the company,[9] will be removed.

The list consists of two parts, first, the list of present members as at the commencement of the winding-up, which is commonly called the "A list," and, secondly, the list of past members who

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[1] Act of 1862, s. 74.

[2] *Ib.* s. 38.

[3] *Ib.* s. 38.

[4] *Ib.* s. 23. See Lindley on Companies, 119, 752.

[5] *Tufnell's Case*, 29 Ch. D. 421.

[6] *Ib.* s. 98. See s. 35; Lindley on Companies, 745 *et seq.*; *Re Onward Bdg. Soc.*, [1891] 1 Q. B. 463.

[7] *Isaacs' Case*, [1892] 2 Ch. 158; *Re Hercynia Co.*, [1894] 2 Ch. 403, *ante*, p. 267.

[8] *Bloomenthal* v. *Ford*, [1897] A. C. 156.

[9] *Baillie's Case*, [1898] 1 Ch. 110.

have ceased to be members within a year before the commencement of the winding-up, which is commonly called the "B list."

If a registered shareholder seeks to escape liability as a contributory in the winding-up on the ground that he was induced to take the shares by fraud or misrepresentation, he must not only rescind his contract or repudiate the shares, but also get his name removed before the winding-up, or at least commence proceedings to have it removed before the commencement of the winding-up.[1]

Difference between compulsory and voluntary winding-up.

The practical differences (apart from the Companies (Winding-up) Act, 1890) between a compulsory winding-up by the Court and a voluntary winding-up by the shareholders are that, in a winding-up by the Court, the liquidator is appointed by and is an officer of the Court, and is obliged to consult and obtain the sanction of the judge or his chief clerk before exercising his powers, and this necessarily causes some delay and often considerable expense; whereas, in a voluntary winding-up, the liquidator is appointed by the members and can act on his own discretion without going to the Court, though he may, if he pleases, apply to the Court to determine any question arising in the winding-up, or to exercise powers which the liquidator does not possess.[2]

Voluntary winding-up.

A voluntary winding-up is often resorted to for the purpose of dissolving the company with a view to its reconstruction on a different basis, or to amalgamate with another company.[3]

A company may be wound up voluntarily under the following circumstances:—[4]

> "(1.) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:
>
> "(2.) Whenever the company has passed a special resolution[5] requiring the company to be wound up voluntarily:
>
> "(3.) Whenever the company has passed an extraordinary resolution[5] to the effect that it has been proved to their satisfaction

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[1] See Lindley on Companies, 772 *et seq.*; *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *per* Lindley, L.J., *Re Scottish Petroleum Co.*, 23 Ch. D. 437; *Tomlin's Case*, [1898] 1 Ch. 104; *Burgess's Case*, 15 Ch. D. 507; see notes to *Chandelor* v. *Lopus*, 2 Sm. L. C. 58.

[2] See Lindley on Companies, 874.

[3] See Act of 1862, s. 161.

[4] *Ib.* s. 129.

[5] See *ante*, p. 273.

that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same."

A voluntary winding-up commences as from the date of the resolution to wind up,[1] but it is not a bar to the right of any creditor to have the company wound up by the Court if the Court is of opinion that his rights would be prejudiced by a voluntary winding-up.[2] If the Court orders the company to be wound up by the Court, it may provide for the adoption of all or any of the proceedings taken in the course of the voluntary winding-up.[3]

Winding-up subject to supervision of Court.

When a resolution has been passed by a company to wind up voluntarily, the Court may make an order that the voluntary winding-up shall continue subject to the supervision of the Court.[4]

A supervision order being an order to continue a voluntary winding-up, does not alter the period of the commencement of the winding-up; and it may prescribe the extent to which the winding-up is to be carried on without consulting the judge. Practically, winding-up under supervision differs from voluntary winding-up chiefly in the greater facilities which it affords for obtaining the assistance of the Court and the greater control over the liquidator, its general effect being to continue the winding-up subject to such restrictions, if any, as the Court may impose;[5] and, subject to such restrictions, the liquidators may exercise all their powers without the sanction or intervention of the Court.[6]

Winding-up Act, 1890.

The Companies (Winding-up) Act, 1890,[7] does not apply to a voluntary winding-up except in regard to the provisions for making delinquent directors, officers, and promoters liable,[8] and for the making of a statement as to the position of the liquidation by the liquidator to the registrar of joint stock companies.[9] The Act may, however, be made use of by the Court so as to place restrictions on the liquidator's powers analogous to those which the legislature has now imposed, if the creditors desire it, upon the liquidator in a compulsory winding-up.[10]

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[1] Act of 1862, s. 130.

[2] *Ib.* s. 145.

[3] *Ib.* s. 146.

[4] *Ib.* s. 147.

[5] Lindley on Companies, 875, 886. This mode of winding up first appears in 20 & 21 Vict. c. 14, s. 19.

[6] Act of 1862, s. 151.

[7] 53 & 54 Vict. c. 63.

[8] *Ib.* s. 10.

[9] *Ib.* s. 15; *Re Stock and Share Co.*, [1894] 1 Ch. 736.

[10] *Re Watson*, [1891] 2 Ch. 55.

The main object of this Act is to introduce the procedure under the Bankruptcy Act, 1883, into the winding up of English companies,[1] and for this purpose it subjects the liquidation to the control of the Board of Trade, imposes certain duties on the official receivers in bankruptcy, and enables the creditors and contributories to appoint a committee of inspection. It requires the official receiver to make reports to the Court calling attention to any matters which ought to be inquired into with respect to the promotion, formation, or failure of the company, or the conduct of its business.

Delinquent directors, officers, and promoters.

The Court can, under this Act, order the public examination on oath of any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer[2] of the company, who appears to have misapplied or retained, or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company;[3] and the Court may compel such person to re-pay or restore any such moneys or property, or to pay damages.[4]

Official receiver.

The official receiver is *ex officio* provisional liquidator,[5] and is permanent liquidator unless the creditors and contributories determine to apply to the Court to appoint some other person as liquidator and the Court makes such appointment.[6] He may petition the Court for a compulsory order where the company is being wound up voluntarily or under supervision.[7]

Joint Stock Companies Arrangement Act, 1870.

Under the Joint Stock Companies Arrangement Act, 1870,[8] where a compromise or arrangement is proposed between a company which is in course of being wound up voluntarily or under the supervision of the Court, and its creditors, or any class of its creditors, the Court may order a meeting of such creditors to be summoned, and, if a majority in number representing three-fourths in value of such creditors, present in person or by proxy[8] at the meeting agree to the arrangement or compromise, it becomes

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[1] See Lindley on Companies, Supplement, p. 17.

[2] *Re Western Counties Co.*, [1897] 1 Ch. 617.

[3] See *Re General Phosphate Co.*, [1895] 1 Ch. 3.

[4] 53 & 54 Vict. c. 63, s. 10. *Ante*, p. 274.

[5] See as to his powers, *Re English Bank of the River Plate*, [1892] 1 Ch. 391.

[6] *Ib.* s. 6. The Court has a discretion under this section; *Re Johannesberg Gold Co.*, [1892] 1 Ch. 583.

[7] *Ib.* s. 14.

[8] 33 & 34 Vict. c. 104.

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binding, if sanctioned by the Court, on all such creditors and on the liquidator and contributories.[1]

Unregistered company.

An unregistered company may not be wound up voluntarily or under the supervision of the Court, but only by the Court.[2]

County Court.

Where the capital of a company paid up or credited as paid up does not exceed 10,000*l.*, and the registered office of the company is situate within the jurisdiction of a County Court having jurisdiction under the Companies (Winding-up) Act, 1890, a petition to wind up the company, or to continue the winding-up under the supervision of the Court, must be presented to that County Court.[3]

Debentures and Debenture Stock.

Meaning of.

The word "debenture," though often used by lawyers, bears no definite legal meaning. It generally signifies a document under the seal of a company given to secure the repayment of money (or money's worth) to a creditor of the company. The debenture may be only a certificate of indebtedness, but it generally contains or imports a covenant to pay, which is usually at the present day accompanied by some charge or security on the property of the company, so that some debentures are secured and some are not secured.[4]

Although as a general rule debentures are issued in series to different persons whose debentures rank *pari passu*, there is nothing to prevent all the debentures, or one debenture for the total amount intended to be raised, being issued to one person.[5]

There is a great difference between corporations established by Royal Charter and companies incorporated by or under the general provisions of an Act of Parliament. A corporation of the former class has power to deal with its property and to bind itself by contract in the same manner as if it was an ordinary person, unless indeed the charter restricts it from so doing. On the other hand, where a corporation is created by statute, the statute must be looked

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[1] See *Re Alabama R. Co.*, [1891] 1 Ch. 213; *Re Midland Coal Co.*, [1895] 1 Ch. 267; Lindley on Companies, 711.

[2] Act of 1862, s. 199.

[3] Companies (Winding-up) Act, 1890, s. 1 (3) and (5). Lindley on Companies, Supplement, 166.

[4] *Edmonds* v. *Blaina Co.*, 36 Ch. D. 215; *Levy* v. *Abercorris Co.*, 37 Ch. D. 260; *British India Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165.

[5] *Levy* v. *Abercorris Co.*, *supra.*

at to see what the corporation is intended to do, and therefore to see what are the limits of its powers.[1]

Borrowing power of company.

It follows that, where a company is incorporated by a special Act, or under the provisions of a general Act, that Act must be looked at; thus, where it is incorporated under the Companies Acts, its memorandum and articles of association must be looked at for the purpose of seeing whether its power to borrow money on debentures is limited. But, in the absence of restriction, "a company limited by shares may borrow as much money as it can get. A company under the Companies Clauses Acts has only limited powers of borrowing."[2]

Debentures irregular but *intra vires*,

Where debentures are improperly issued, there are two possible cases, first, where the issue was within the powers of the company, though it was irregular in the particular circumstances; in which case the debentures are invalid in the hands of a person knowing of the irregularity,[3] and also in the hands of his assigns, unless they are negotiable, or create a legal charge, or the company is estopped from disputing their validity as against a *bonâ fide* purchaser for value without notice of the irregularity. On the other hand, if the debentures are *ultra vires*, which may happen either because all borrowing is prohibited or because there is a limit to the amount which may be borrowed and that amount has already been raised, they are invalid even in the hands of *bonâ fide* holders for value, except so far as the money which they represent has been applied for the lawful purposes of the company.[4]

—issued *ultra vires*.

Charge on uncalled capital.

A company limited by shares can create a charge upon its uncalled capital, unless prohibited by the memorandum or articles of association,[5] or unless the case is within sect. 5 of the Companies Act, 1879.[6] A charge upon "future property" is not a charge upon uncalled capital.[7]

Power of directors to borrow.

It should also be observed that, even if the company has power

[1] *Wenlock* v. *River Dee Co.*, 36 Ch. D. 685, n.; *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653. And see the note on the limits of corporate powers in Pollock on Contract, 674, note D.

[2] *Per* Ld. Macnaghten, *Ooregum Co.* v. *Roper*, [1892] A. C. 147; *General Auction Co.* v. *Smith*, [1891] 3 Ch. 432.

[3] *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156; *Davies* v. *Bolton*, [1894] 3 Ch. 678.

[4] Lindley on Companies, 193, citing *Athenæum Co.* v. *Pooley*, 1 Giff. 102; 3 De G. & J. 294; *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354; *Landowners' Inclosure Co.* v. *Ashford*, 16 Ch. D. 434.

[5] *Re Pyle Works*, 44 Ch. D. 534; *Newton* v. *Anglo-Australian Co.*, [1895] A. C. 244.

[6] *Re Mayfair Co.*, [1898] 2 Ch. 28.

[7] *Re Streatham Co.*, [1897] 1 Ch. 15; *Re Russian Spratts Co.*, [1898] 2 Ch. 149.

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to borrow, its liability for the money borrowed in its name by the directors depends upon whether the directors had authority, express or implied, to borrow the money, or in cases where they had no such authority, upon whether the company has ratified the transaction.[1] In the absence of express provision as to borrowing, the directors of trading companies have, but the directors of other companies have not, an implied power to borrow money for the purposes of the company.[2]

"Floating charges."

Debentures issued by companies are sometimes secured by a legal mortgage of a specific part of the property of the company, usually effected by means of a trust deed; sometimes they are merely charged on the property of the company for the time being, or on the "undertaking," so as to constitute a floating equitable security, but not so as to prevent the company from dealing with its property in the ordinary course of business.[3] If any of the property covered by such debentures consists of land, a contract for the sale of such debentures is a contract for the sale of an interest in land within sect. 4 of the Statute of Frauds.[4]

Priority of legal mortgages;

It follows that where a company, after issuing debentures which create a "floating charge" only, makes a legal mortgage of a specific part of its property, at any time before the debenture holders have taken steps to enforce their security,[5] such mortgage has priority over the debentures.[6]

Sometimes the debentures provide that the company shall not create any mortgage or charge to take priority of the debentures; in such case, if they are secured by a mere equitable charge, a person taking a legal mortgage without notice of the debenture charge would take priority over it.[7] Such a restrictive condition will not apply to prevent a solicitor acquiring a lien, though he has notice of the restriction.[8]

—of distress or judgments;

A distress for rent will take priority over such floating charges,[9]

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[1] *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 374.

[2] *Ex p. Pitman*, 12 Ch. D. 707; *Maclae* v. *Sutherland*, 3 E. & B. 1; *General Auction Co.* v. *Smith*, [1891] 3 Ch. 432, where the cases are discussed.

[3] *Willmott* v. *London Celluloid Co.*, 34 Ch. D. 147. See *Re Florence Land Co.*, 10 Ch. D. 530; *Brunton* v. *Electrical Corporation*, [1892] 1 Ch. 434.

[4] *Driver* v. *Broad*, [1893] 1 Q. B. 744.

[5] *Governments Stocks Co.* v. *Manila R. Co.*, [1897] A. C. 81.

[6] *Wheatley* v. *Silkstone Coal Co.*, 29 Ch. D. 715; *English & Scottish Co.* v. *Brunton*, [1892] 2 Q. B. 700; Palmer's Company Precedents, 821.

[7] *English & Scottish Co.* v. *Brunton*, *sup.*

[8] *Brunton* v. *Electrical Corporation*, [1892] 1 Ch. 434.

[9] *Re Roundwood Co.*, [1897] 1 Ch. 373.

but an execution will not, unless, perhaps, the goods have been sold before the debenture holders intervene.[1]

—of statutory preferential debts.

Under the Preferential Payments in Bankruptcy Acts, 1888 and 1897, certain debts are entitled to priority over claims in respect of such floating charges.[2]

Realization of the security.

On the appointment of a receiver on behalf of the debenture holders, or on the commencement of the winding up of the company, the security of the debenture holders ceases to be a mere floating charge, and becomes a specific charge on the property of the company then existing;[3] or it may be expressly made to attach as a specific charge in case of default in payment of interest or of principal,[4] in which case the debenture holders must take steps to enforce their security in order to make it attach as a specific charge.[5] The debenture holders may lose their priority by negligence.[6] The occurrence of a winding-up makes the debentures immediately payable, though the specified time of payment has not arrived, so that the debenture holders can at once enforce their security.[7]

Remedies of debenture holders.

Debenture holders may, if the property charged is in danger, obtain the appointment of a receiver by the Court before any default has been made in payment.[8] If the debentures, or the trust deed, gives such power, they may themselves appoint a receiver of the property charged.[9] After default in payment, they may bring an action to enforce their security and obtain payment, and get a receiver appointed in such action;[10] or they may foreclose;[11] or they may petition to have the company wound up;[12] or apply to enforce their security in an existing winding-up.[13]

There is, however, no power to give effect to the security by a

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[1] *Taunton* v. *Warwickshire, Sheriff of*, [1895] 2 Ch. 319; *Davey* v. *Williamson*, [1898] 2 Q. B. 194. As to priority of a garnishee order, see *Robson* v. *Smith*, [1895] 2 Ch. 118.

[2] 51 & 52 Vict. c. 62; 60 Vict. c. 19.

[3] *Ex p. Bradshaw*, 15 Ch. D. 465; *English Channel Co.* v. *Rolt*, 17 Ch. D. 715.

[4] *Re Horne*, 29 Ch. D. 736; see *Hubbuck* v. *Helms*, 35 W. R. 574.

[5] *Governments Stock Co.* v. *Manila R. Co.*, [1897] A. C. 81.

[6] *Re Castell*, [1898] 1 Ch. 315.

[7] *Hodson* v. *Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Co.*, [1894] 2 Ch. 547.

[8] *Hubbuck* v. *Helms*, 35 W. R. 574; *McMahon* v. *N. Kent Iron Co.*, [1891] 2 Ch. 181; *Re Victoria Co.*, [1897] 1 Ch. 158.

[9] *Re Pound*, 42 Ch. D. 402; *Re Stubbs*, [1891] 1 Ch. 475. See *Gosling* v. *Gaskell*, [1897] A. C. 575.

[10] *Willmott* v. *Celluloid Co.*, 52 L. T. 642; see *British Linen Co.* v. *S. American Co.*, [1894] 1 Ch. 108.

[11] *Sadler* v. *Worley*, [1894] 2 Ch. 170; *Re Continental Co.*, [1897] 1 Ch. 511.

[12] *Re Portsmouth Tram. Co.*, [1892] 2 Ch. 362.

[13] *Ex p. Bradshaw*, 15 Ch. D. 465.

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sale, or to appoint a manager of the undertaking, where it is of a public nature, as a railway or gas or waterworks company; in such cases the debenture holders can only obtain the profits or fruits of the company's business by means of a receiver.[1]

Companies under Companies Clauses Act, 1845.

Where a company, constituted by a special Act incorporating the Companies Clauses Consolidation Act, 1845,[2] is authorized by the special Act to borrow money on mortgage or bond (which are commonly comprehended under the term debenture), it may exercise the power from time to time with the authority of a general meeting to the extent authorized by the special Act.[3]

Mortgage of "undertaking."

The mortgages may comprise "the undertaking"[4] and future calls on the shareholders.[5]

Mortgage of calls.

The mortgagees and bond holders respectively have no preference one above another by reason of priority of date.[6]

Registration.

A register of the bonds and mortgages is kept, and may be inspected by any shareholder or mortgagee or bond creditor, or by any person interested in a bond or mortgage.[7]

Transfers.

Transfers of bonds or mortgages must be made by deed in the statutory form, which requires registration to complete the title of the transferee.[8] A transfer "in blank" is not a transfer by deed until the blank has been filled up and the instrument re-delivered by the transferor;[9] and, therefore, the registration of such a transfer which has not been re-delivered is ineffectual.[9] The Act requires that the deed shall be stamped and state the true consideration;[10] it is doubtful whether non-compliance with this provision will render the transfer invalid.[11]

Interest on the bonds and mortgages is payable in preference to any dividends payable to the shareholders.[12] If a period is

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[1] *Gardner* v. *L.C. & D.R. Co.*, 2 Ch. 201; *Blaker* v. *Herts Waterworks Co.*, 41 Ch. D. 399; *per* James, L.J., in *Attree* v. *Hawe*, 9 Ch. D. 347.

[2] 8 & 9 Vict. c. 16.

[3] *Ib.* ss. 38, 39, 40. Mortgages or bonds issued without the authority of a general meeting are valid in the hands of a purchaser for value without notice; *Re Romford Canal Co.*, 24 Ch. D. 85; *Fountaine* v. *Carmarthen R. Co.*, 5 Eq. 316.

[4] As to the meaning of "undertaking," see 8 & 9 Vict. c. 16, s. 2; *Gardner* v. *L. C. & D. R. Co.*, 2 Ch. 201. It appears to mean the going concern created by the special Act.

[5] 8 & 9 Vict. c. 16, ss. 38, 43, *ante*, p. 289.

[6] *Ib.* ss. 42, 44. See *Landowners' Co.* v. *Ashford*, 16 Ch. D. 411.

[7] *Ib.* s. 45. See as to enforcing the right of inspection, *Mutter* v. *Eastern and Midlands R. Co.*, 38 Ch. D. 92.

[8] *Ib.* ss. 46, 47.

[9] *Powell* v. *London & Provincial Bank*, [1893] 1 Ch. 610; [1893] 2 Ch. 555.

[10] *Ib.* s. 46.

[11] *Powell* v. *London, &c. Bank*, *sup.*

[12] 8 & 9 Vict. c. 16, s. 48.

fixed by the mortgage deed or bond for repayment of the principal, upon the expiration of that period the principal becomes payable on demand; if no time is fixed, the mortgagee or bondholder can, after twelve months from the date of the mortgage or bond, demand payment of the principal and arrears of interest on giving six months' notice, and in the like case the company may at any time pay off the money borrowed on giving six months' notice.[1]

Remedies of mortgagee, —receiver.

Where the special Act empowers the mortgagees to enforce payment of arrears of interest, or of principal and interest, by the appointment of a receiver, two justices may, upon the mortgagees' application, appoint a receiver of the tolls or sums liable to the payment of the interest, or principal and interest.[2]

Of bondholder—

A bondholder of the company can enforce his security only by action; and on obtaining judgment he is in the same position as any other judgment creditor of the company, *i.e.*, he can obtain a receiver,[3] and can issue execution against all its property, but not so as to prevent the carrying on of the undertaking of the company; and, in the case of railway companies, a manager may be appointed, but the rolling stock and plant are protected by statute.[4] Although the surplus lands of a railway company may be ordered to be sold on the application of an execution creditor, the lands actually used for the purposes of the railway cannot be sold.[5]

execution.

Debenture stock,

—under Companies Clauses Acts;

Where a company, incorporated for the purpose of carrying on any undertaking, is authorized by special Act incorporating Part III. of the Companies Clauses Act, 1863,[6] to issue debenture stock, it may, with the sanction of a special meeting, raise any part of the money, authorized to be raised by mortgage or bond, by the issue of debenture stock instead of mortgages and bonds. By the Railway Companies Act, 1867, this power is extended to railway

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[1] *Ib.* ss. 50, 51.

[2] *Ib.* ss. 53, 54. See *Fripp* v. *Chard R. Co.*, 11 Hare, 241, as to the jurisdiction of the Court also to appoint a receiver.

[3] As to execution by the appointment of a receiver, see M. L. R. P., p. 385, and *post*, p. 304.

[4] 30 & 31 Vict. c. 127, s. 4, made perpetual by 38 & 39 Vict. c. 31. See *Re Mersey R. Co.*, 37 Ch. D. 610; *Re Eastern and Midlands R. Co.*, 45 Ch. D. 367. As to the meaning of "railway" company, see *Re E. & W. Ind. Docks Co.*, 38 Ch. D. 576; *G. N. R. Co.* v. *Tahourdin*, 13 Q. B. D. 320.

[5] *Gardner* v. *L. C. & D. R. Co.*, 2 Ch. 201, 385; *Re Bishops Waltham R. Co.*, 2 Ch. 382; *Re Hull & Hornsea R. Co.*, 2 Eq. 262.

[6] 26 & 27 Vict. c. 118, ss. 22 *et seq.*

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companies,[1] and, by the Companies Clauses Act, 1869,[2] to companies which by Act of Parliament have power to borrow on mortgages or bonds, but not power to issue debenture stock.

Debenture stock, with the interest thereon, is a charge on the undertaking of the company prior to all shares or stock of the company, and the interest on it has priority over all dividends or interest on any shares or stock, and ranks next to the interest on mortgages or bonds which have been legally granted before the issue of the debenture stock;[3] but the holders of debenture stock are not entitled to any priority *inter se* as regards debenture stock issued under the same special Act.[4] Payment of the interest may be enforced by the appointment of a receiver, or by action.[4] Holders of debenture stock have no right to vote as such at meetings of the company, and cannot require repayment of the principal money paid up in respect of it.[5]

Debenture stock, therefore, confers a right to a perpetual annuity payable out of the undertaking of the company, and the holder differs from a debenture holder in that he has no right to the repayment of his capital, though he has a charge for his interest.[6] He is a creditor and not a member of the company, and receives only a fixed rate of interest whatever the net profits of the company.[7]

—under Companies Act, 1862.

A company registered under the Companies Act, 1862, may issue debenture stock if empowered by its memorandum of association to do so;[8] and perhaps under a general borrowing power.[9] But debenture stock of such companies differs from debenture stock issued under the Companies Clauses Act, 1863, in that the principal as well as the interest is generally charged on the company's property, and that the company is bound to repay the principal.[10]

Issue at discount.

Debentures may be issued at a discount in the absence of provision to the contrary.[11]

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[1] 30 & 31 Vict. c. 127, s. 24; *Re Mersey R. Co.*, [1895] 2 Ch. 287.

[2] 32 & 33 Vict. c. 48, s. 3.

[3] Act of 1863, ss. 23—27.

[4] *Ib.* s. 24; *Re Mersey R. Co.*, *sup.*

[5] *Ib.* s. 31.

[6] *Attree* v. *Hawe*, 9 Ch. D. 337; *Re Burry Co.*, 33 W. R. 741.

[7] *Re Bodman*, [1891] 3 Ch. 135, 138.

[8] Buckley on Companies, 181.

[9] Palmer's Comp. Prec., 783 *et seq.*

[10] See Palmer's Comp. Prec., 750 *et seq.*

[11] *Re Anglo-Danubian Co.*, 20 Eq. 339; *Re Regent's Ironworks Co.*, 3 Ch. D. 43; *Re Compagnie Générale*, 4 Ch. D. 470; *Webb* v. *Shropshire R. Co.*, [1893] 3 Ch. 307.

Limited companies registered under the Companies Act, 1862,[1] are required to keep a register of all mortgages and charges affecting their property, and to allow it to be inspected and copies to be taken,[2] but an unregistered mortgage is valid.[3]

Bills of Sale Acts.

Debentures issued by "any mortgage, loan, or other company and secured upon the capital stock or goods, chattels and effects of such company" are exempted from the operation of the Bills of Sale Act, 1882.[4]

This exemption is not confined to companies *ejusdem generis* with mortgage and loan companies; and every company authorized to raise money on loan or mortgage is a company *ejusdem generis* with a "mortgage or loan" company.[5]

Debentures of any incorporated company which is required to keep a register of mortgages, as, for instance, companies subject to the Companies Clauses Consolidation Act, 1845,[6] or the Companies Act, 1862,[7] or a deed of charge to cover such debentures, are not bills of sale within the scope of the Bills of Sale Act, 1878,[8] for they are not secret documents, or documents of the class by which frauds were perpetrated upon creditors by means of secret bills of sale.[9]

Local Loans Act, 1875.

The Local Loans Act, 1875,[10] contains provisions as to the raising of loans by local authorities on the security of debentures, debenture stock, or annuity certificates. The Act does not confer any fresh powers of borrowing, but presupposes that the local authority has *aliunde* power to borrow in one or all of these forms.

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[1] 25 & 26 Vict. c. 89, s. 43.

[2] *Nelson* v. *Anglo-American Co.*, [1897] 1 Ch. 130.

[3] *Wright* v. *Horton*, 12 App. Cas. 371.

[4] 45 & 46 Vict. c. 43; see s. 17. See *Re Standard Co.*, [1891] 1 Ch. 627.

[5] *Re Standard Co.*, [1891] 1 Ch. 645, disapproving *Jenkinson* v. *Brandley Co.*, 19 Q. B. D. 568.

[6] 8 & 9 Vict. c. 16.

[7] 25 & 26 Vict. c. 89.

[8] 41 & 42 Vict. c. 31. See *Re Standard Co.*, [1891] 1 Ch. 627; *Richards* v. *Kidderminster Overseers*, [1896] 2 Ch. 212.

[9] *Ante*, p. 105.

[10] 38 & 39 Vict. c. 83.

CHAPTER XVII.

EXECUTIONS.

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We proceed to discuss the methods of enforcing a judgment debt against the personal estate[1] of the debtor by execution.[2]

Judgment creditor not a purchaser.

It is a general principle, with regard to both real and personal property, that a judgment creditor is not a purchaser, that he stands in the shoes of the judgment debtor, and can obtain by execution only such property as belongs to the debtor both at law and in equity; he must take subject to all prior interests created by the debtor for value, whether legal or equitable.[3]

Leave to issue execution.

Generally execution can be levied without leave, but in certain cases leave must be obtained, the most important instances being where six years have elapsed since the judgment or order, or any change has taken place, by death or otherwise, in the parties entitled or liable to execution, or a husband is entitled or liable to execution on a judgment for or against a wife, or upon a judgment of assets *in futuro*, or a party is entitled to execution against any of the shareholders of a company on a judgment against such company or a public officer or other person representing the company.[4]

When a company is being wound up execution against the company cannot be issued or proceeded with without leave.[5] In the

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[1] As to methods of enforcing a judgment against the land, including chattels real, of the debtor, see M. L. R. P. 382.

[2] "Execution signifieth in law the obtaining of an actual possession of anything acquired by judgment of law, or by a fine executory levied, whether it be by the sheriff or by entry of the party;" Co. Litt. 154a. "An action is said in its proper sense to continue until judgment be given, and after judgment doth process of execution begin;" Co. Litt. 289a. See as to executions generally, R. S. C., Ord. XLII.; Anderson on Executions.

[3] See *Whitworth* v. *Gaugain*, 1 Ph. 728, Cr. & Ph. 325, and other cases explained in Elph. & Cl. Searches, 10; *Dolphin* v. *Aylward*, L. R. 4 H. L. 500, *per* Ld. Hatherley, C.; *Davey* v. *Williamson*, [1898] 2 Q. B. 194.

[4] See *ante*, pp. 260, 267, 280, and R. S. C., Ord. XLII. r. 23.

[5] Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 85, 87, 163.

case of the bankruptcy of a judgment debtor, the rights of a judgment creditor to issue execution, or to retain the proceeds of an execution already levied, are affected by the Bankruptcy Acts, 1883 and 1890.[1]

Execution may be effected by means of a writ or order addressed to the sheriff or other public officer, or by the Court making an order supplemental to the judgment, or giving special directions to some private person for the purpose of enforcing the judgment.

Fieri Facias.

What can be seized under a *fi. fa.*

A writ[2] of *fieri facias* (commonly called *fi. fa.*) is a writ given to a judgment[3] creditor by the common law. It is a writ addressed by the Crown to the sheriff,[4] by virtue of which he seizes the goods and chattels of the debtor and sells them, and (in practice) applies the proceeds in payment to the judgment creditor of the amount due to him instead of paying it into Court as directed by the writ. At common law the sheriff could seize under a *fi. fa.* all the debtor's corporeal personal property[5] which can be sold,[6] except wearing apparel actually in use and (perhaps) goods in the personal possession of the debtor.[7] But it is provided by statute[8] that "the wearing apparel and bedding of any judgment debtor or his family and the tools and implements of his trade," not exceeding in the whole the value of 5*l.*, shall not be liable to seizure.

The common law rule as to things liable to seizure has been extended by statute[9] to money,[10] bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, and the sheriff can pay the money or bank notes to the

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[1] 46 & 47 Vict. c. 52, ss. 9, 10, 45, 46, as amended by 53 & 54 Vict. c. 71, s. 11. See *Woolford* v. *Levy*, [1892] 1 Q. B. 772; *Burns-Burns* v. *Brown*, [1895] 1 Q. B. 324; *Hasluck* v. *Clark*, [1898] 2 Q. B. 28.

[2] As to the meaning of "writ," see M. L. R. P. 382. See the form of *fi. fa.* in R. S. C., Appx. H.

[3] An order, as well as a judgment, for payment of money can be enforced by a *fi. fa.* R. S. C., Ord. XLII. rr. 17, 24.

[4] In the County Court a warrant of execution in the nature of a *fi. fa.* is addressed to the high bailiff of the Court, and in any other inferior Court a warrant of the like nature is issued to one of the bailiffs of the Court.

[5] Including leaseholds for years; Elph. & Cl. Searches, 68.

[6] *Legg* v. *Evans*, 6 M. & W. 36.

[7] *Sunbolf* v. *Alford*, 3 M. & W. 254.

[8] 8 & 9 Vict. c. 127, s. 8.

[9] 1 & 2 Vict. c. 110, s. 12.

[10] *I.e.*, coin, not debts due to the judgment debtor; *Harrison* v. *Paynter*, 6 M. & W. 387.

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execution creditor, and hold the other property so authorized to be seized as security for the amount directed to be levied by the *fi. fa.*, with power to sue thereon at the time of payment.

Even since this Act deeds and writings cannot be seized unless they are securities for money.[1]

Fixtures.

Fixtures annexed to the freehold of the debtor cannot be seized;[2] but, where the debtor is possessed of the land for a term of years, fixtures which may be removed by him can be seized.[3]

Emblements —crops.

Emblements,[4] *i.e.*, those growing crops which pass to the executor as being the fruit of the industry of the owner, can be taken in execution,[5] but not permanent growths, such as trees or grass.

Things hired by or pledged to debtor.

Things let to the debtor may be seized, but only his interest therein can be sold, and, if the sheriff sells more, he becomes liable to an action for the conversion.[6] Goods pledged can be seized for the debt of the pledgor on payment of the debt to the pledgee, but not otherwise;[7] and the interest of the pledgee can be taken in execution under a *fi. fa.* for the debt of the pledgee.[8]

Railway companies.

The rolling stock and plant of a railway company are in some cases protected from execution.[9]

Soldiers.

The pay, arms, ammunition, equipments, regimental necessaries or clothing of all soldiers of the regular forces cannot be seized in execution.[10]

Possession of sheriff.

By the effect of the seizure the sheriff acquires possession of the goods, and therefore may maintain an action against any person who takes them;[11] but the debtor remains the owner of them till the sheriff sells.[12]

Execution subject to rent.

Where the goods seized are on "any messuages, lands or tenements leased[13] for life or lives, term of years, or otherwise," they cannot be taken unless the execution creditor, before the

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[1] See, as to what are securities for money, *Stokoe* v. *Cowan*, 29 Bea. 637; *Alleyne* v. *Darcy*, 5 Ir. Ch. R. 55; *Re Sargeant*, 7 L. R. Ir. 66.

[2] *Winn* v. *Ingilby*, 5 B. & Ald. 625; 24 R. R. 503; *Steward* v. *Lombe*, 4 Moo. 283.

[3] *Minshall* v. *Lloyd*, 2 M. & W. 459; *Poole's Case*, 1 Salk. 368; *Dumergue* v. *Rumsey*, 2 H. & C. 777.

[4] M. L. R. P. 23.

[5] See 56 Geo. 3, c. 50, s. 1.

[6] Consider *Fenn* v. *Bittleston*, 7 Ex. 152.

[7] *Rogers* v. *Kennay*, 9 Q. B. 592.

[8] *Re Rollason*, 34 Ch. D. 495.

[9] 30 & 31 Vict. c. 127, s. 4; 38 & 39 Vict. c. 31, s. 1; 46 & 47 Vict. c. 39.

[10] 44 & 45 Vict. c. 58, s. 144.

[11] *Wilbraham* v. *Snow*, 2 Wms. Saund. 47.

[12] *Giles* v. *Grover*, 9 Bing. 128; 1 Cl. & F. 72; 36 R. R. 27; *Woodland* v. *Fuller*, 11 A. & E. 859.

[13] *I.e.*, under an existing lease, not under a lease which has determined before the seizure; *Cox* v. *Leigh*, L. R. 9 Q. B. 333.

removal of the goods from the premises, pays the landlord all sums due for rent, not exceeding, in the case of tenements let at a weekly rent, four weeks' arrears; in the case of tenements let for any other term less than a year, the arrears of rent accruing during four such terms, and in any case not exceeding one year's rent.[1] The sheriff levies for the amount so paid for rent for the benefit of the execution creditor.[1]

After the seizure the sheriff's officer employs an auctioneer to catalogue and sell the goods. The sale is on the premises where the goods are seized if the person in possession of the premises consents; if he does not, they are removed for the purposes of the sale. The sheriff's officer may remain on the premises a reasonable time[2] for the purpose of removing the goods to a place of safe custody till they can be sold. Where the execution is for upwards of 20*l.*, including incidental legal expenses, the sale must be by public auction and not by bill of sale or private contract, unless the Court from which the proceedings issued orders otherwise.[3]

Goods seized, when bound as against purchaser from debtor.

At common law the goods are bound from the *teste*[4] of the writ of execution,[5] so that no subsequent dealing with them by the debtor could take away the sheriff's right to seize them if he could find them within his bailiwick. By the Statute of Frauds[6] it was provided that the goods were not to be bound, as regards purchasers for value,[7] until the writ was delivered to the sheriff;[8] and, by the Mercantile Law Amendment Act,[9] that no writ of *fi. fa.* should prejudice the title to goods acquired before the actual seizure of the goods by a *bonâ fide* purchaser for value without notice that the writ had been delivered to the sheriff.

Sale of Goods Act, 1893.

These provisions were repealed by the Sale of Goods Act, 1893, which provides that "a writ of *fi. fa.*, or other writ of execution against goods shall bind the property in the goods of the execution

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[1] 8 Anne, c. 14 (c. 18 in Revised Statutes), s. 1, as amended by 7 & 8 Vict. c. 96, s. 67.

[2] *Playfair* v. *Musgrove*, 14 M. & W. 239; *Ash* v. *Dawnay*, 8 Ex. 237.

[3] The Bankruptcy Act, 1883, s. 145; Bankruptcy Act, 1890, s. 12; R. S. C., Ord. XLIII. rr. 8—15; *Crawshaw* v. *Harrison*, [1894] 1 Q. B. 79.

[4] *I.e.*, the date, because, when the king's writs were in Latin, the date was contained in the clause beginning "*Teste meipso.*"

[5] *Anon.*, Cro. El. 174; *Fleetwood's Case*, 8 Rep. 171a.

[6] 29 Car. 2, c. 3, s. 16.

[7] *Hutchinson* v. *Johnston*, 1 T. R. 729; 1 R. R. 380.

[8] *Guest* v. *Cowbridge R. Co.*, 6 Eq. 619; *Ex p. Williams*, 7 Ch. 317, *per* Mellish, L.J.

[9] 19 & 20 Vict. c. 97, s. 1.

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debtor as from the time when the writ is delivered to the sheriff to be executed," and that the date of such delivery shall be indorsed on the writ.[1] But "no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration" without notice "that such writ, or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff."[1]

Bailiff.

In practice the writ is generally executed by a "bound bailiff"[2] under an order from the sheriff, called "a warrant," to execute the writ. But it may be executed by the sheriff in person or by the under-sheriff, or by a special bailiff under the sheriff's warrant.[3]

When a *fi. fa.* is once sued out, it may be executed notwithstanding the death of the execution creditor[4] or of the debtor.[5]

Return *to* the writ—and *of* the writ.

Strictly speaking, it is the duty of the sheriff to draw up and sign a formal statement of what he has done in obedience to the writ; which statement when signed is called "the return to the writ": and he ought afterwards to send the writ and the return to the writ to the Supreme Court. This latter process is sometimes called "the return of the writ." The judgment creditor or judgment debtor can compel the sheriff to return the writ.[6]

The return *to* the writ must be carefully distinguished from the return *of* the writ; the difference between them is analogous to the difference between writing and posting a letter.

Execution against partnership property for a partner's separate judgment debt.

Under a *fi. fa.* against a partner on a judgment against such partner for a private debt the sheriff could formerly seize all such of the assets of the firm as are seizable under a *fi. fa.*, but he could only sell the share and interest of the execution debtor in the goods so seized, and not the whole of the debtor's interest in the partnership, including book debts and goodwill, for these could not be reached by a *fi. fa.*; and the only way in which the purchaser could ascertain what he was entitled to under the sale was by taking the accounts of the partnership; for, as we have pointed out, the share of each partner is not a share in any specific

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[1] 56 & 57 Vict. c. 71, s. 26; *Bagshawes* v. *Deacon*, 78 L. T. 776.

[2] *I.e.*, a person who has entered into a bond with sureties for the due performance of his office. See Blackstone, bk. i., ch. 9.

[3] See as to the under-sheriff and other officers, the Sheriffs Act, 1887 (50 & 51 Vict. c. 55).

[4] *Clerk* v. *Withers*, Holt, 303, 646.

[5] *Park* v. *Mosse*, 1 Leon. 144.

[6] R. S. C., Ord. LII. r. 11; *Edmunds* v. *Watson*, 7 Taunt. 5; *Angell* v. *Baddeley*, 3 Ex. D. 49.

asset.[1] By the Partnership Act, 1890,[2] a writ of execution is not to issue against any partnership property except on a judgment against the firm,[3] but the judgment creditor of a partner may obtain an order charging the partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and the appointment of a receiver of that partner's share of profits and of any other money which may be coming to him in respect of the partnership;[4] and the other partner or partners may redeem the interest charged, or, in case of a sale being directed, may purchase it.

Elegit.

Elegit.

Under the writ of elegit, which is founded upon the statute 13 Edw. 1, c. 18, the sheriff seized and delivered to the judgment creditor all the chattels of the debtor (saving only his oxen and beasts of the plough), and one half of his land, until the debt was levied. Subsequently it was enacted that the whole of the debtor's land could be seized under the writ.[5] Now a writ of elegit does not extend to goods.[6]

A creditor to whom the debtor's land has been delivered under an "elegit" can obtain an order for the sale of the debtor's interest.[7]

Execution by means of the Court.

We proceed to consider various modes of execution by means of orders of the Court itself as distinguished from execution under the authority of writs.

Attachment of debts.

Attachment of debts.

Garnishee.

A judgment creditor[8] may obtain from the Court or a judge *ex parte* an order that all debts owing or accruing from any person, called the garnishee, to the judgment debtor, shall be attached to answer the judgment, and directing by the same or a subsequent

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[1] *Ante*, p. 9. See *Helmore* v. *Smith* (1), 35 Ch. D. 436; Anderson on Execution, 208, 284.

[2] 53 & 54 Vict. c. 39, s. 23.

[3] As to execution where a judgment or order is against a firm, see R. S. C., Ord. XLVIIIA. r. 8.

[4] *Post*, p. 304. *Brown* v. *Hutchinson*, [1895] 1 Q. B. 737; [1895] 2 Q. B. 126.

[5] 1 & 2 Vict. c. 110, s. 11.

[6] 46 & 47 Vict. c. 52, s. 146.

[7] 27 & 28 Vict. c. 112, s. 4.

[8] In this place the phrase includes any person who has obtained a judgment or order for payment of money.

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order the garnishee to show cause why he should not pay to the judgment creditor the debt due from him or so much as will satisfy the judgment debt.[1] Service of an order on, or notice of it to, the garnishee binds such debts in his hands.[2] The debts which can be attached may be legal or equitable,[3] payable at the present or at a future time;[4] but they must be existing debts. Unliquidated damages,[5] or an unascertained sum,[6] or a debt to arise on a condition,[7] or money which will be payable to the debtor by trustees when they have received it, but not yet received by them,[8] or rent not yet due,[9] cannot be, though rent which is due can be, attached;[10] and debts that cannot be assigned cannot be attached. The pay of an officer in the army or navy,[11] seamen's wages,[12] and the wages of a servant, labourer, or workman, at any rate in an inferior Court, cannot be attached.[13]

If the garnishee does not pay into Court the sum that he ought to pay, and does not dispute the debt claimed to be due from him to the judgment debtor, the Court may direct execution to issue against him; but if he disputes his liability, the Court may direct the question to be tried.[14] If it is suggested[15] that a third person has a lien or charge on the debt, the Court can order such person to appear, and may bar his claim or make such order as it thinks fit with respect to the lien or charge.[16] Payment by the garnishee into Court, or to the judgment creditor on an order being made, or execution for such payment[17] levied upon him in the proceedings, is a valid discharge as against the judgment debtor to the amount paid or levied.[18] It should be observed that the effect of a garnishee order is to place the judgment creditor in the shoes of the judgment debtor. He has, therefore, no better

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[1] R. S. C., Ord. XLV. r. 1.

[2] *Ib.* r. 2; *Rogers* v. *Whiteley*, [1892] A. C. 118.

[3] *Per* Brett, M.R., *Webb* v. *Stenton*, 11 Q. B. D. 525.

[4] *Tapp* v. *Jones*, L. R. 10 Q. B. 591.

[5] *Jones* v. *Thompson*, E. B. & E. 63; *Dresser* v. *Johns*, 6 C. B. N. S. 429.

[6] *Johnson* v. *Diamond*, 11 Ex. 73; *Richardson* v. *Elmit*, 2 C. P. D. 9.

[7] *Howell* v. *Metropolitan District R. Co.*, 19 Ch. D. 508.

[8] *Webb* v. *Stenton*, 11 Q. B. D. 518.

[9] *Holsham* v. *Passawar*, Chitty's Archbold's Practice, 929 (*b*).

[10] *Mitchell* v. *Lee*, L. R. 2 Q. B. 259.

[11] *Apthorpe* v. *Apthorpe*, 12 P. D. 192.

[12] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 163.

[13] 33 & 34 Vict. c. 30; *Booth* v. *Trail*, 12 Q. B. D. 8; *Gordon* v. *Jennings*, 9 Q. B. D. 45.

[14] Ord. XLV. rr. 3, 4.

[15] Not necessarily by the garnishee; *Roberts* v. *Death*, 8 Q. B. D. 319.

[16] Ord. XLV. rr. 5, 6.

[17] *Turner* v. *Jones*, 1 H. & N. 878.

[18] Ord. XLV. r. 7.

right than the latter, so that, if the judgment debtor has created an equitable charge on the debt attached, the judgment creditor takes the debt subject to the charge, even if the person entitled to the charge has not perfected his title by giving notice (*ante*, p. 127) to the garnishee;[1] and debts which have been assigned by the judgment debtor before the order cannot be attached;[2] for a garnishee order binds only what the judgment debtor can honestly deal with without interfering with the interests of third persons.[3] A debt attachment book, in which particulars of the attachment have to be entered, is kept in the Central Office, but there appears to be no penalty for omitting to make such entry.[4]

Charging Order.

Charging order.

Until the commencement of the present reign, stock or shares could not be taken in execution; but now a judgment creditor can obtain[5] an order, called a "charging order," charging the judgment debt and interest upon the debtor's interest, whether in possession, remainder, or reversion, and whether vested or contingent, in any government stock, funds or annuities, or any stock or shares in a public company in England, or the dividends or interest thereof, whether being funds in Court or not,[6] and whether standing in the debtor's name in his own right,[7] or in the name of a trustee for him;[8] and a charging order may be made upon cash in Court to the credit of the debtor.[9] The order entitles the creditor to the same remedies as if the charge was made by the debtor. The effect of the order does not depend on the capacity of the debtor to make the charge, but on the validity of the judgment.[10] No proceedings can be taken to enforce payment of

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[1] *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536, 546; 38 Ch. D. 238, 257; *Re General Horticultural Co.*, 32 Ch. D. 512.

[2] *Hirsch* v. *Coates*, 18 C. B. 757; *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240.

[3] *Davis* v. *Freethy*, 24 Q. B. D. 519.

[4] Ord. XLV. r. 8.

[5] 1 & 2 Vict. c. 110, ss. 14, 15; 3 & 4 Vict. c. 82; R. S. C., Ord. XLVI. r. 1;

[6] *Hulkes* v. *Day*, 10 Sim. 41.

[7] *I.e.*, to which he is beneficially entitled; *Cooper* v. *Griffin*, [1892] 1 Q. B. 740; *Howard* v. *Sadler*, [1893] 1 Q. B. 1; *Fuller* v. *Earle*, 7 Ex. 796; *Re Blakeley Co.*, 25 W. R. 111; *Gill* v. *Continental Union Gas Co.*, L. R. 7 Ex. 332.

[8] *South Western Co.* v. *Robertson*, 8 Q. B. D. 17.

[9] *Brereton* v. *Edwards*, 21 Q. B. D. 488.

[10] *Re Leavesley*, [1891] 2 Ch. 1, where a charging order was made on a fund in Court belonging to a lunatic in respect of debts incurred before the lunacy.

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the debt by realizing the security until after six months from the date of the order, though the creditor can, in the meantime, obtain an order restraining the debtor from receiving the dividends accruing during the six months.[1] In order to prevent the debtor from disposing of his interest, the charging order may be made in the first instance *ex parte* as an order *nisi*, and, when made absolute, the charge takes effect from the date of the charging order *nisi*.[2] If the fund is in Court, notice of the order *nisi* must be given to the Paymaster-General.[3] The charge conferred by the order affects only the interest that the debtor can, or could if *sui juris*, honestly assign; and, therefore, it confers no priority over incumbrances created before the order *nisi*, even if the incumbrancer has neglected (where the debtor's interest is equitable) to perfect his title by notice to trustees,[4] or, if the fund is in Court, by obtaining a stop order.[5] A judgment creditor who has obtained a charging order must, if he wishes to enforce the charge conferred by the charging order, institute an action for that purpose, for the Court cannot direct a sale of the property charged in the action in which judgment was recovered.[6]

Equitable Execution—Receiver.

"Equitable execution."

Where there is no remedy by ordinary process of execution, an order for a receiver may be obtained so as to give the judgment creditor the same benefit which he would have got by execution. Strictly speaking, however, this is not execution, but a substitute for it by way of equitable relief, granted where there is some obstacle to ordinary execution.[7]

A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff showed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property, which prevented his obtaining possession at law.[8] Since the Judicature Acts the

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[1] *Watts* v. *Jefferyes*, 3 Mac. & G. 372.

[2] *Haly* v. *Barry*, 3 Ch. 452.

[3] *Brereton* v. *Edwards*, 21 Q. B. D. 488.

[4] *Scott* v. *Hastings*, 4 K. & J. 633; see *per* Kay, L.J., *Re Leavesley*, [1891] 2 Ch. 10, 11.

[5] *Carter* v. *Stadden*, 34 W. R. 363.

[6] *Leggott* v. *Western*, 12 Q. B. D. 287.

[7] *Per* Cotton and Bowen, L.JJ., *Re Shephard*, 43 Ch. D. 131, 135, 137.

[8] *Ib.* p. 138, *per* Fry, L.J.; and see *Levasseur* v. *Mason*, [1891] 2 Q. B. 73.

Court which gave judgment can make the order, and it is not necessary to go through the formality of first issuing a writ of execution.[1]

Receiver.

A receiver is a person appointed by the Court to receive the rents and profits or income of specified property, whether real, chattel real, or personal, or of any legal or equitable interest therein.

Judicature Act, 1873, s. 25 (8).

By the Supreme Court of Judicature Act, 1873,[2] the Court may appoint a receiver "in all cases in which it shall appear to the Court to be just or convenient that such appointment should be made."[3] This gives jurisdiction to appoint a receiver by way of equitable execution only when the circumstances of the case are such as would have enabled the Court of Chancery to make such an order before the Act, and does not give jurisdiction to appoint a receiver merely because it would be a more convenient mode of satisfying the judgment than the ordinary modes of execution.[4]

When obtainable.

Equitable execution, therefore, can only be obtained where a debtor's property cannot be got at by the ordinary modes of execution. For instance, where the debtor's real property is subject to a mortgage;[5] where specific chattels are subject to a mortgage bill of sale; or where it is wished to take in execution the interest of the debtor under a settlement of personalty,[6] in which case the appointment of the receiver does not dispossess the trustees, but only renders it their duty to hand over to the receiver the property or income which they would be bound to hand over to the debtor if the receiver had not been appointed.

A receiver will not be appointed of property which is inalienable by the debtor, such as inalienable pensions,[7] or of future earnings.[8]

Prior incumbrances.

It need hardly be said that the appointment of a receiver does not interfere with the rights of a prior incumbrancer, except that if the latter is not in possession he is not allowed to take posses-

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[1] *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; see Elph. & Cl. Searches, 72.

[2] 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

[3] Apparently a County Court can appoint a receiver of personalty by way of equitable execution; *Reg.* v. *Judge of County Court of Lincolnshire*, 20 Q. B. D. 171.

[4] *Harris* v. *Beauchamp*, [1894] 1 Q. B. 801.

[5] *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 283.

[6] *Webb* v. *Stenton*, 11 Q. B. D. 518.

[7] *Lucas* v. *Harris*, 18 Q. B. D. 127; *Crowe* v. *Price*, 22 Q. B. D. 429.

[8] *Holmes* v. *Millage*, [1893] 1 Q. B. 551; *Cadogan* v. *Lyric Theatre*, [1894] 3 Ch. 338.

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sion without the leave of the Court after the receiver has gone into possession.

The order appointing the receiver must clearly define the property of which he is to take possession,[1] for it is not the practice of the Court to appoint a receiver of a judgment debtor's property generally.[2]

An application for the appointment of a receiver by way of equitable execution must, generally, be made by summons; but there is jurisdiction to appoint upon an *ex parte* application, which will be exercised where there is danger that the property will disappear before a summons can be heard.[3]

The order appointing the receiver generally directs him to give security;[4] he has to pay all moneys received by him into Court, and from time to time the moneys, after providing for costs and the receiver's remuneration, are paid out to the persons entitled thereto.

The receiver by his appointment becomes an officer of the Court, and if he takes possession no one is entitled to interfere with him without an order of the Court.[5]

Sequestration.[6]

Sequestration is a process *in rem*, not *in personam*,[7] for the purpose of compelling obedience not only to an order or judgment for payment of money, but of any other order. Under the present Rules of the Supreme Court, where any person is by any judgment or order directed to pay money into Court or to do any other act *in a limited time*, and after due service of such judgment or order refuses or neglects to obey the same, the person prosecuting the judgment or order can, without obtaining any order for that purpose, issue a writ of sequestration against the estate and effects of such disobedient person.[8] Sequestration was, and

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[1] *Crow* v. *Wood*, 13 Beav. 271.

[2] *Hamilton* v. *Brogden*, (1891) W. N. 14.

[3] *Minter* v. *Kent, &c. Soc.*, 72 L. T. 186.

[4] See *Edwards* v. *Edwards*, 2 Ch. D. 291; *Smart* v. *Flood*, 49 L. T. 467.

[5] See *Broad* v. *Wickham*, 4 Sim. 511; *Russell* v. *East Anglian R. Co.*, 3 Mac. & G. 104; *Lane* v. *Sterne*, 3 Giff. 629.

[6] For the history of the writ of sequestration, see Anderson on Executions, 512 *et seq.*

[7] *Tatham* v. *Parker*, 1 Sm. & G. 514.

[8] Ord. XLIII. r. 6.

is, a process of contempt to compel a defendant to perform a duty.[1]

The writ of sequestration is a writ issued from the High Court, and is addressed to not less than four persons therein named called the sequestrators, and nominated by the person prosecuting the judgment,[2] commanding them, or any three or two of them, to enter upon and to take the rents and profits of the real estate and the goods and personal estate of the person in default, and to keep the same under sequestration in their hands until the person in default shall pay a certain sum of money, or clear his contempt, and the Court shall make other order to the contrary.[3]

The sequestrators are entitled to all the debts due to, and choses in action of, the person in default,[4] and to his stock,[5] and to money in Court belonging to him;[6] but until an order is obtained from the Court for payment of the debt or other chose in action to the sequestrators, the debtor may pay the person in default.[7] The Court can order the sale of stock standing in the name of the person in default.[8]

The sequestrators may take possession of all personal chattels of the person in default, including growing crops,[9] but excepting wearing apparel and bedding of that person and his family, or the tools and implements of his trade, the value of such apparel, bedding, tools and implements, not exceeding in the whole *5l.*[10] The sequestrators cannot, however, sell the chattels without leave of the Court, which is only granted if the object of the sequestration is to enforce payment of a sum of money, or if costs have been incurred, or if the goods are of a perishable nature.

When the person in default has cleared his contempt, an order can be made for discharge of the sequestration, with directions to the sequestrators to withdraw from possession, and to pass their final accounts, and after retaining their costs, &c., to pay the balance to that person.

The proceeds of the writ are dealt with by order of Court.[11]

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[1] *Per* Chitty, J., *Pratt* v. *Inman*, 43 Ch. D. 175.

[2] *Rowley* v. *Ridley*, 2 Dick. 630.

[3] See the form in App. H. (No. 13) to R. S. C.

[4] *Francklyn* v. *Colhoun*, 3 Swanst. 276; 19 R. R. 204; *Miller* v. *Huddlestone*, 22 Ch. D. 233.

[5] *Cowper* v. *Taylor*, 16 Sim. 314.

[6] *Conn* v. *Garland*, 9 Ch. 101.

[7] *Wilson* v. *Metcalfe*, 1 Beav. 263.

[8] *Cowper* v. *Taylor*, 16 Sim. 314.

[9] *Dixon* v. *Smith*, 1 Swanst. 457; *Pelham* v. *Newcastle*, 3 Swanst. 290, n.

[10] 8 & 9 Vict. c. 127, s. 8.

[11] Ord. XLIII. r. 6; *Walker* v. *Bell*, 2 Mad. 24; 17 R. R. 174.

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There appears to be some doubt whether a sequestration can be issued to enforce payment of money to a person, as distinguished from payment into Court.[1]

The writ cannot issue unless there has been an order for the payment of money, or performance of some other act within a limited time.

It may be issued by leave of the Court or judge against a corporation wilfully disobeying any judgment or order.[2]

A sequestration to enforce the payment of costs cannot be issued without leave of the Court or a judge.[3]

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[1] See this discussed, Anderson on Executions, 539, where the conclusion is arrived at that this doubt is not well founded.

[2] Ord. XLII. r. 31.

[3] Ord. XLIII. r. 7; *Hulbert* v. *Cathcart*, [1896] A. C. 470.

CHAPTER XVIII.

BANKRUPTCY.

One creditor may, by his diligence in obtaining judgment and suing out execution thereon, obtain satisfaction of his claim in priority to the debtor's other creditors; and at common law a man who was unable to pay his debts in full could not be freed from liability even by giving up all his property to be divided among his creditors in satisfaction, so far as it would go, of their claims. If his body was taken in execution by a creditor, under the right which was formerly given by the law, he might remain in prison all his life; and, even if he was not imprisoned, any property that he might at any time acquire was liable to be taken from him so long as any debt remained unsatisfied.

The common law has been altered by a series of Acts commonly called "the Bankruptcy Acts." It is necessary to have a general knowledge of the effect of the repealed Acts, for the title to property is still in some cases affected by them.[1]

"Bankrupt."

The term "bankrupt," in its original meaning, denoted a trader who secreted himself, or did certain other acts tending to defraud his creditors. The word is said to have been derived from "*bancus*," the counter of a tradesman, and "*ruptus*," broken, denoting one whose trade is gone.[2] But since October, 1861,[3] the term includes non-traders.

Object of Bankruptcy Acts.

The object of the earlier Acts was "to relieve the creditors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts; so that one should not prevent the other, but all should be in *æquali jure*."[4]

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[1] See as to the early bankruptcy law, 2 Bl. 285, 471 *et seq.*

[2] 2 Bl. 285, 472; 4th Instit. 277.

[3] The Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), ss. 69, 232.

[4] *The Case of Bankrupts*, 2 Rep. 25 *b*.

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The modern law of bankruptcy extends to non-traders, and "has for its object the distribution of an insolvent's[1] assets equitably among his creditors and persons to whom he is under liability; and upon this *cessio bonorum* to release him under certain conditions from future liability in respect of his debts and obligations."[2]

34 & 35 Hen. 8, c. 4.

The earliest statute[3] relating to bankruptcy was directed against all fraudulent debtors, whether traders or not. It authorized the Lord Chancellor and certain other great officers of state to seize the property of the debtor and to distribute it rateably among his creditors.

13 Eliz. c. 7.

This statute was followed by an Act,[4] which applied to traders only, and under which the jurisdiction was vested in the Lord Chancellor alone, who was empowered to appoint commissioners to seize the persons and property of bankrupt traders and to distribute the property rateably. Proceedings under this Act were commenced by suing out a commission of bankruptcy under the Great Seal: and the property of the bankrupt vested in the commissioners, who assigned it to assignees by whom it was realized and distributed among the creditors.[5]

4 Anne, c. 17.

Neither of the Acts above mentioned contained any provision for the discharge of the bankrupt; but it was provided by 4 Anne, c. 17 (an Act amended by several subsequent statutes which require no notice in this place), that a trader who had surrendered all his effects might, with the consent of a specified number of his creditors, obtain an order of discharge, called a "certificate of conformity."

6 Geo. 4, c. 16.

All the prior Acts were consolidated and amended by the Act of 1825.[6] This Act retained the principle of collecting and distributing the estates of bankrupt traders by means of creditors' assignees. It was framed on the lines of the previous Acts, but it introduced the principle of deeds of arrangement, subject, however, to very severe restrictions.

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[1] The word "insolvent" is here used in the sense of a person unable to pay his debts; but it sometimes denotes a debtor who took the benefit of the "Insolvency Acts" (see Elph. & Cl. Searches, 100; *post*, p. 311), which had the same general purpose as the Bankruptcy Acts, but applied to non-traders only.

[2] *Per* James, L.J., *Ex p. Walton*, 17 Ch. D. 756, cited *per* Cairns, C., *Hill* v. *E. & W. India Dock Co.*, 9 App. Cas. 456.

[3] 34 & 35 Hen. 8, c. 4.

[4] 13 Eliz. c. 7.

[5] As to the nature of the jurisdiction of the Lord Chancellor in proceedings under this Act, see Yate-Lee & Wace, 2.

[6] 6 Geo. 4, c. 16.

In 1831 the first Court of Bankruptcy, called the Court of Review, was established.[1] The jurisdiction of the Lord Chancellor in bankruptcy was transferred to the Court of Review, subject to an appeal to the Lord Chancellor. Official commissioners were appointed with all the powers theretofore vested in commissioners appointed by the Lord Chancellor. Proceedings in bankruptcy under this Act were commenced by the petition of a creditor to the Lord Chancellor, followed by the issue of a "fiat" by one of the judges or a master of the Court of Chancery authorizing the creditor to prosecute his complaint in the Court of Review, or before persons named in the *fiat* who were to have all the powers of commissioners appointed under the Great Seal. A certain number of persons were to be appointed by the Lord Chancellor to Act as "official assignees." All the personal estate and the rents and profits of the real estate, and the proceeds of sale of the estate, both real and personal, of the bankrupt were to be received by the official assignee alone. The "present and future real estate" of a bankrupt was to vest in the official assignee and the assignee or assignees chosen by the creditors, by virtue of their appointment, and was to shift from time to time to the assignees for the time being. The then existing law was consolidated and amended by the Bankrupt Law Consolidation Act, 1849,[2] which made some alterations as to deeds of arrangement. Next followed the Bankruptcy Act, 1861,[3] which extended the law of bankruptcy to non-traders and substituted an order of discharge for a certificate of conformity, and facilitated composition deeds.

Court of Review.

"*Fiat*."

"Assignees."

Act of 1849.

Act of 1861.

Prior to this Act non-traders could obtain relief from their debts while in custody for debt only by the filing of a petition to the Insolvent Debtors' Court,[4] either by the debtor or by the creditor at whose suit the debtor was in prison. The Court then made an order vesting the debtor's property in a "provisional assignee," and had power to appoint any other persons to be assignees, on whose appointment the debtor's property passed to them for the benefit of the creditors. After examination of the debtor by the Court, he might be discharged on the terms of

Non-traders —Insolvent Debtors' Court.

[1] By 1 & 2 Will. 4, c. 56, amended by 5 & 6 Will. 4, c. 29.

[2] 12 & 13 Vict. c. 106.

[3] 24 & 25 Vict. c. 134.

[4] 1 & 2 Vict. c. 110, amended by 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 70; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102; all repealed by 24 & 25 Vict. c. 134. There were several earlier Acts, the most important of which was 7 Geo. 4, c. 57.

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giving a warrant of attorney to enter up judgment for the amount of the unsatisfied debts.

Bankruptcy Act, 1869.

By the Bankruptcy Act, 1869,[1] a "trustee" in whom the property of the bankrupt was to vest,[2] was substituted for the creditors' assignees under the former Acts, which were all repealed.[1] A new Court, called "the London Bankruptcy Court," [3] was established having jurisdiction in London and a district round it defined by reference to the Metropolitan County Courts, the jurisdiction outside these limits being given to the local County Courts. There was a chief judge who presided over the London Bankruptcy Court and to whom appeals could be brought from County Courts. This Act was repealed by the Bankruptcy Act, 1883.[4]

Bankruptcy Acts, 1883 and 1890.

The existing law of bankruptcy is regulated by the Bankruptcy Acts, 1883 and 1890,[5] and the Rules thereunder. The object of these Acts is to provide that the property of a person unable to pay his debts in full shall be distributed rateably among his creditors, and that thereupon he shall be freed from his debts, either absolutely or on certain conditions. The alterations in the law made by the Act of 1883 appear to be mainly in matters of administration, the objects being to diminish the powers hitherto given to a majority of the creditors and to put a greater controlling power in the hands of the Court, and also to enforce a more careful and moral conduct on the part of debtors.[6]

It is impossible within the limits of this work to give more than a general outline of the present law of bankruptcy; we propose, however, to explain in some detail the meaning of an "act of bankruptcy" and the effect of bankruptcy on property.

Jurisdiction in bankruptcy.

The Courts having jurisdiction in bankruptcy are the High Court of Justice and the County Courts, except such of the latter as are excluded by order of the Lord Chancellor.[7] County Courts have, for the purposes of their bankruptcy jurisdiction, all the powers of the High Court.[8] Every Court having original

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[1] 32 & 33 Vict. c. 71.

[2] *Ib.* ss. 14 (1), 17.

[3] *Ib.* ss. 59—72.

[4] 46 & 47 Vict. c. 52, ss. 3, 169.

[5] 46 & 47 Vict. c. 52, and 53 & 54 Vict. c. 71. See Bankruptcy Rules, 1886, 1890.

[6] *Per* Lord Esher, M.R., *Ex p. Reed*, 17 Q. B. D. 250; *per* Lopes, L.J., *ib.* 257.

[7] Bankruptcy Act, 1883, s. 92. The London Bankruptcy Court now forms part of the Supreme Court of Judicature, and its jurisdiction is transferred to the High Court; *ib.* s. 93.

[8] S. 100; *Reg.* v. *County Court of Surrey*, 13 Q. B. D. 963; *Ex p. Reynolds*, 15 Q. B. D. 169, 186; *Skinner* v. *County Court Judge of Northallerton*, [1898] 2 Q. B. 680.

jurisdiction in bankruptcy has jurisdiction all over England; and proceedings in bankruptcy may be transferred from one Court to another.[1]

Petition.

Bankruptcy proceedings are instituted by a petition, which may be presented by a creditor or by the debtor himself.[2] The petition is to be presented to the High Court if the debtor "has resided or carried on business[3] within the London Bankruptcy district[4] for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court, or is not in England." In any other case the petition is to be presented to the County Court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition.[5]

"Receiving order."

If a debtor commits an act of bankruptcy,[6] the Court may make a "receiving order" for the protection of the estate on the petition of a creditor or creditors to the amount of 50*l.* presented within three months of the act of bankruptcy, or on the petition of the debtor himself alleging that he is unable to pay his debts.[7]

Official receiver.

On the making of a receiving order an "official receiver" is thereby constituted receiver of the property of the debtor,[8] and thereafter creditors are prohibited from taking proceedings against the debtor in respect of any debt provable in bankruptcy, unless with leave of the Court.[8]

Effect of receiving order.

A receiving order does not divest the debtor of his property, nor make him a bankrupt, nor place him under the disabilities of an adjudicated bankrupt. Notwithstanding a receiving order, the debtor is the only person who can sue for the recovery of what belongs to him, and what he recovers in the action is his property, both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them.[9]

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[1] S. 97.

[2] S. 4 (1) (*f*); ss. 5, 8.

[3] See *Ex p. Breull*, 16 Ch. D. 484.

[4] Defined by s. 96 as the City of London and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any metropolitan County Court (as to which see 3rd Schedule to the Act).

[5] S. 95.

[6] See s. 4, as amended by s. 1 of the Act of 1890.

[7] Ss. 5, 6, 8.

[8] S. 9.

[9] *Per* Lindley, L.J., *Rhodes* v. *Dawson*, 16 Q. B. D. 553; *Re Berry*, [1896] 1 Ch. 939.

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First meeting of creditors.

As soon as may be after the receiving order a "first meeting of creditors" is held to consider whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor shall be adjudged bankrupt.[1] The debtor has to submit to the official receiver a statement of his affairs showing his assets and liabilities,[2] and is examined at a public sitting of the Court as to his conduct, dealings, and property.[3]

Composition or scheme of arrangement.

The debtor may, within four days after submitting his statement of affairs, or within such extended time as the official receiver may fix, lodge with the official receiver a proposal in writing embodying the terms of a composition or scheme of arrangement of his affairs which he is desirous of submitting for the consideration of his creditors. Thereupon a meeting of creditors is to be held before the public examination is concluded, and, if the proposal for the composition or scheme is accepted at that meeting by a majority in number and three-fourths in value of the creditors who have proved, it will, when approved by the Court, be binding on all the creditors. An application to the Court for approval is not to be heard until after the public examination is concluded, and the Court, before approving the proposal, must hear a report of the official receiver as to its terms and as to the conduct of the debtor, and any objections made by any creditor. In certain cases (for example, if the terms are not reasonable) the Court must refuse, and in other cases it may either approve or refuse to approve, the proposal. When a composition or scheme is accepted and approved, it binds all the creditors so far as relates to debts provable in bankruptcy, but does not release the debtor from certain specified liabilities, except as expressly ordered by the Court. There is power, in case of default of payment of any instalments under the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or delay, or that the approval was obtained by fraud, to adjudge the debtor bankrupt and to annul the composition or scheme without prejudice to anything done under it.[4]

Composition distinguished from bankruptcy.

The rights of creditors and of the debtor under a composition are different from those under a bankruptcy.

At common law a debt could not be satisfied by the mere pay-

[1] Act of 1883, s. 15. [2] S. 16. [3] S. 17; Act of 1890, s. 2.
[4] Act of 1890, s. 3 (replacing the repealed s. 18 of the Act of 1883).

ment of a smaller sum of money (*ante*, p. 155) : but, where an arrangement is made between a debtor and his creditors or some of them that he shall pay, and that they shall take smaller sums than those actually due in satisfaction of their debts, the consideration for each creditor giving up part of his debt is the giving up of part of their debts by the other creditors,[1] and the arrangement is valid at common law irrespective of statute, so that the rights of the creditors and debtor in such cases depend upon express contract. The operation of a composition under the Act of 1869 was that the debtor was left in possession of his property and entitled to deal with and dispose of it as he thought fit; and, subject to the payment of the composition, he became a free man, discharged from his obligations and remitted to his former rights.[2]

By the General Rules under the Act of 1883,[3] on the approval of a composition or scheme the official receiver is to put the debtor (or, as the case may be, the trustee under the composition or scheme, or the other person or persons to whom under the composition or scheme the property of the debtor is to be assigned) into possession of the debtor's property; and the receiving order must be discharged. If the composition or scheme is annulled, the property is to vest in the official receiver, unless the Court otherwise directs.

Adjudication.

When a receiving order has been made, if no composition or scheme is accepted and approved, the Court "shall adjudge"[4] the debtor bankrupt, and thereupon his property is to become divisible among his creditors and to vest in a trustee.[5]

Trustee.

Until a trustee is appointed, the official receiver is the trustee, and immediately on the adjudication the property of the bankrupt vests in him as such trustee: and when a trustee other than the official receiver is appointed, the property forthwith passes to and vests in the trustee appointed.[6] With respect, however, to property acquired after the bankruptcy, the bankrupt can give a good title to a *bonâ fide* purchaser for value.[7]

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[1] *Good* v. *Cheesman*, 2 B. & Ad. 328; 36 R. R. 374. *Per* Ld. Blackburn, *Société Générale* v. *Geen*, 8 App. Cas. 614; *Couldery* v. *Bartrum*, 19 Ch. D. 399.

[2] See *Ex p. Manchester and Liverpool Bank*, 18 Eq. 253; *Ex p. Castle*, 1 Ch. D. 113; *Ex p. Burrell*, *ib.* 547; *Bolton* v. *Ferro*, 14 Ch. D. 176.

[3] Bankruptcy Rules, 208, 212, 213.

[4] *Re Thurlow*, [1895] 1 Q. B. 724.

[5] Act of 1883, s. 20.

[6] S. 54. See *Turquand* v. *Board of Trade*, 11 App. Cas. 286.

[7] *Cohen* v. *Mitchell*, 25 Q. B. D. 262; *Re Clark*, [1894] 2 Q. B. 350; *Re Clayton*, [1895] 2 Ch. 212.

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The trustee may be appointed by the creditors, or, on their default for four weeks, by the Board of Trade, with power for the creditors to appoint a trustee in his place.[1]

The creditors may appoint several persons to be trustees jointly or successively.[2]

The trustee may sue and be sued by the official name of "the trustee of the property of a bankrupt," and by that name may hold property of every description, make contracts, and enter into any engagements binding on himself and his successors in office.[3]

During any vacancy in the office of trustee, the official receiver is to act as trustee.[4]

Committee of inspection.

The creditors may also appoint a "committee of inspection," to consist of not more than five or less than three creditors, to superintend the administration of the bankrupt's property by the trustee;[5] and the creditors may delegate the appointment of the trustee to the committee of inspection.[6]

Even after adjudication the creditors may entertain a proposal for a composition or scheme, the proceedings on which are similar to those on a composition or scheme before adjudication, and if the Court approves, it may annul the bankruptcy and vest the property of the bankrupt in him or such other person as the Court may appoint;[7] and the Court may annul the composition and adjudicate the debtor a bankrupt upon the same grounds as in the case of a composition approved before adjudication.[8]

Discovery of debtor's property.

The Acts contain most elaborate provisions as to the assistance to be given by the debtor, and by every other person supposed to be capable of giving information as to the debtor's affairs, to the official receiver or trustee with respect to the discovery or realization of the debtor's property.[9]

Discharge of bankrupt.

At any time after adjudication the bankrupt may apply for an order of discharge, but the application is not to be heard until after the public examination of the bankrupt is concluded. On hearing the application the Court is to consider the report of the official receiver as to the bankrupt's conduct and affairs, and may either

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[1] S. 21; Act of 1890, s. 4.
[2] S. 84.
[3] S. 83.
[4] S. 87 (4), and s. 70 (1) (*g*).
[5] S. 22; Act of 1890, s. 5.
[6] S. 21 (1).
[7] S. 23; Act of 1890, s. 6.
[8] *Ante*, p. 314.
[9] Ss. 24, 27; Act of 1890, s. 7.

grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order subject to conditions as to the earnings or income or after-acquired property of the bankrupt. But the discharge must be refused if the debtor has committed certain criminal offences in connection with his bankruptcy,[1] unless for special reasons the Court otherwise determines;[2] and, on the proof of certain facts, the most important of which is that his assets do not amount to 10*s.* in the pound on his unsecured liabilities (unless this fact arises from circumstances for which he cannot justly be held responsible), the Court must either refuse the discharge, or suspend it for not less than two years, or suspend it till a dividend of not less than 10*s.* in the pound has been paid to the creditors, or require the bankrupt to consent to judgment being entered up against him for the balance or part of the balance of the unsatisfied provable debts to be paid out of his future earnings or after-acquired property, but so that execution is not to be issued without leave of the Court.[3]

Debts provable.

Debts provable under the bankruptcy are "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order."[4] But they do not include "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust."[5] A person having notice of an act of bankruptcy available against the debtor cannot prove for any debt or liability contracted by the debtor subsequently to such notice.[6] The debtor is, however, released from such a debt by his discharge, for it is a "debt provable in bankruptcy," although the creditor cannot, under the circumstances, prove.[7]

Mutual credits.

Where there have been mutual credits or debts or dealings, there is a set-off, and the creditor may prove for, or pay, the balance, as the case may be.[8]

Priority of debts.

Rates and taxes not exceeding one year's assessment, and the wages or salary of a clerk or servant during four months before the

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[1] *Re Hedley*, [1895] 1 Q. B. 923.
[2] *Re Stevens*, [1898] 2 Q. B. 495.
[3] Act of 1890, s. 8.
[4] Act of 1883, s. 37 (3).
[5] S. 37 (1).
[6] S. 37 (2).
[7] *Buckwell* v. *Norman*, [1898] 1 Q. B. 622.
[8] S. 38. See notes to *Rose* v. *Hart*, 2 Sm. L. C. 288.

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receiving order, and not exceeding 50*l.*, and the wages of a labourer or workman during two months before the receiving order, and not exceeding 25*l.*, are to be paid in full in priority to all other debts.[1] Provision is also made for preferential claims by apprentices or articled clerks with respect to premiums,[2] and as to the preferential right of a landlord to distrain for six months' rent.[3]

Secured creditors.

A "secured" creditor, *i.e.*, "a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor,"[4] may either—

(1.) Rely on his security, and not prove; or

(2.) Realise his security and prove for the balance of his debt; or

(3.) Surrender his security and prove for his whole debt; or

(4.) Assess the value of his security and receive a dividend in respect of the balance: in which case the trustee may redeem the security on payment of the assessed value, or require the property to be sold.[5]

Acts of bankruptcy.

Acts of bankruptcy[6] may be divided into three classes:—[7] (A.) Personal acts or defaults on the part of the debtor; (B.) Dealings with his property; (C.) Acts which show the insolvent state of his affairs.

Personal acts or defaults.

(A.) Personal acts or defaults of the debtor, done or made with the intention[8] of defeating or delaying his creditors, consist of—

(1.) Departing out of England;[9]

(2.) Remaining out of England;[10]

(3.) Departing from his dwelling-house;[11]

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[1] S. 40, as amended by the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1.

[2] S. 41.

[3] S. 42, as amended by s. 28 of the Act of 1890; s. 1 (4) of the Preferential Payments Act, 1888.

[4] S. 168.

[5] Act of 1883, Sched. II., rr. 9—16.

[6] Defined by the Act of 1883, s. 4, as amended by the Act of 1890, s. 1.

[7] Baldwin on Bankruptcy, 72.

[8] The intention is essential: *Re Wood*, 7 Ch. 302; it is immaterial whether, as a matter of fact, the creditors are (*Ex p. Osborne*, 1 Rose, 387) or are not (*Williams* v. *Nunn*, 1 Taunt. 270; *Chenoweth* v. *Hay*, 1 M. & S. 676) delayed.

[9] See *Windham* v. *Paterson*, 2 Rose, 466. As to a foreigner returning home, see *Ex p. Crispin*, 8 Ch. 374; *Ex p. Gutierrez*, 11 Ch. D. 298.

[10] *Ex p. Bunny*, 1 De G. & J. 309. As to a debtor domiciled abroad, see *Ex p. Brandon*, 25 Ch. D. 500.

[11] See *Charrington* v. *Brown*, 11 Moore, 341; *Re McKeand*, 6 Morr. 240.

(4.) Otherwise absenting himself;[1]

(5.) Beginning to keep house.[2]

(B.) Dealings by the debtor with his property.[3] Dealings with property,

These consist of—

(1.) Any conveyance or assignment[4] in England or elsewhere[5] by the debtor of his property to a trustee or trustees for the benefit of his creditors. The conveyance or assignment must be of the whole, or substantially the whole, of the debtor's property.[6] A creditor who has assented thereto cannot avail himself of the conveyance as an act of bankruptcy.[7] Sometimes such a conveyance may be set aside under 13 Eliz. c. 5.[8] —(1) Conveyance to trustee for creditors,

(2.) Fraudulent conveyance, gift, delivery, or transfer in England or elsewhere[5] by the debtor of his property, or of any part thereof. —(2) Fraudulent conveyances or gifts,

Dispositions may be fraudulent either under 13 Eliz. c. 5,[8] or under the bankruptcy laws.

A mortgage of all, or substantially all, a man's property to secure an existing debt,[9] unless the mortgage is made in pursuance of a *bonâ fide* agreement made at the time of the advance,[10] is fraudulent. On the other hand, a mortgage of all a man's property for a substantial present advance,[11] or for a past debt and a substantial present advance, in order to enable the debtor to continue his business,[12] or for a past debt and further advances agreed to be made, and in fact made,[13] is not fraudulent. Of course, a *bonâ fide* sale of the whole of a man's property is not fraudulent.[14]

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[1] See *Ex p. Meyer*, 7 Ch. 188; *Chenoweth* v. *Hay*, 1 M. & S. 676; *Bernasconi* v. *Farebrother*, 10 B. & C. 549; *Russell* v. *Bell*, 10 M. & W. 340; *Re Alderson*, [1895] 1 Q. B. 183.

[2] *E.g.*, a denial to creditors, sanctioned by the debtor; *Ex p. Foster*, 17 Ves. 416; *Muchlow* v. *May*, 1 Taunt. 479; *Richardson* v. *Pratt*, 52 L. T. 614.

[3] Act of 1883, s. 4 (1) (a), (b), (c).

[4] *Re Spackman*, 24 Q. B. D. 728; *Re Hughes*, [1893] 1 Q. B. 595.

[5] See *Ex p. Crispin*, 8 Ch. 374.

[6] *Re Spackman*, 24 Q. B. D. 728; *Re Hughes*, [1893] 1 Q. B. 595.

[7] *Ex p. Stray*, 2 Ch. 374; *Olliver* v. *King*, 25 L. J. Ch. 427; *Re Smith*, 6 Morr. 30; *Re Adamson*, 71 L. T. 579.

[8] *Ante*, p. 93. Robson on Bankruptcy, 143, 148.

[9] *Re Wood*, 7 Ch. 302; *Re Sinclair*, 26 Ch. D. 319.

[10] *Ex p. Hauxwell*, 23 Ch. D. 626; *Ex p. Burton*, 13 Ch. D. 102.

[11] *Jennell* v. *Reynolds*, 11 C. B. N. S. 709; *Morris* v. *Morris*, [1895] A. C. 625.

[12] *Ex p. Ellis*, 2 Ch. D. 797; *Ex p. Johnson*, 26 Ch. D. 338; *Jamaica, Adm.-Gen. of* v. *Lascelles*, [1894] A. C. 135.

[13] *Ex p. Dann*, 17 Ch. D. 26.

[14] *Baxter* v. *Pritchard*, 1 A. & E. 456; *Ex p. Stubbins*, 17 Ch. D. 58.

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—(3) Fraudulent preferences.

(3.) Conveyance or transfer in England or elsewhere[1] by the debtor of his property or any part thereof, or the creation of any charge thereon, which conveyance, transfer, or charge would, under the Act of 1883, or any other Act, be void as a fraudulent preference, if the debtor were adjudged bankrupt.[2]

Definition.

A fraudulent preference is "every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors."[3] Every such conveyance, &c., is to be deemed fraudulent and void against the trustee in the bankruptcy of the person making it if he be adjudged bankrupt on a petition presented within three months thereafter.[3]

"View to prefer."

We have already pointed out that the necessary consequence of a conveyance of the whole of a debtor's property as security for a past debt is to delay his creditors, and is therefore fraudulent; but a conveyance of part only of his property for that purpose is not necessarily fraudulent within the provisions above referred to. The main difficulty in cases alleged to fall within these provisions is to ascertain whether the payment, &c. was made substantially with the view to prefer the creditor,[4] as distinguished from a payment, &c. made under real pressure by the creditor,[5] or made in the ordinary course of trade,[6] or according to a promise to pay on a particular day,[7] or under a threat of proceedings,[8] or in order to correct a mistake made in a former security.[9]

Where a trustee who has misappropriated trust funds replaces them,[10] or a person duly applies money given to him for a particular purpose,[11] this is not a fraudulent preference.

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[1] See *Ex p. Crispin*, 8 Ch. 374.

[2] S. 4 (1) (c).

[3] S. 48.

[4] *Ex p. Griffith*, 23 Ch. D. 69; *Ex p. Hill*, *ib.* 695; *Ex p. Taylor*, 18 Q. B. D. 295.

[5] *Re Wilkinson*, 1 Morr. 65; *Ex p. Jenkins*, 2 *ib.* 71.

[6] *Tomkins* v. *Saffery*, 3 App. Cas. 235.

[7] *Bills* v. *Smith*, 6 B. & S. 314.

[8] *Re Wilkinson*, 1 Morr. 65.

[9] *Re Tweedale*, [1892] 2 Q. B. 217.

[10] *Ex p. Stubbins*, 17 Ch. D. 58; *Ex p. Taylor*, 18 Q. B. D. 295; *New* v. *Hunting*, [1897] 2 Q. B. 19.

[11] *Ex p. Kelly*, 11 Ch. D. 306.

(C.) Acts which show that the debtor is insolvent. Acts showing insolvency.

These are :—[1]

(1.) Filing by the debtor in the Court a declaration of his inability to pay his debts, or presentation by him of a bankruptcy petition against himself. Declaration of insolvency.

(2.) That execution issued against him has been levied by seizure of his goods[2] under process in an action in any Court or in any civil proceeding in the High Court,[3] and the goods have either been sold or held by the sheriff for twenty-one days.[4] Execution.

(3.) That a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed,[5] has served on him in England, or by leave of the Court elsewhere, a bankruptcy notice under the Act, requiring him to pay the judgment debt in accordance with the terms of the judgment or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained. Bankruptcy notice.

The judgment must have been obtained in England.[6] Any person who is for the time being entitled to enforce the judgment, *i.e.*, an assignee, may serve the notice ;[7] and a judgment creditor who has made an equitable assignment may do so.[8] The words "final judgment" have been construed strictly to mean a judgment where there has been a proper *litis contestatio*, and a final adjudication of it between the parties.[9]

If the time for payment has expired and no application has

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[1] Act of 1883, s. 4 (1) (f), (g), (h) ; Act of 1890, s. 1.

[2] "Goods" are defined, by s. 168, as meaning all chattels personal, and therefore they include choses in action ; *Colonial Bank* v. *Whinney*, 11 App. Cas. 434.

[3] *Ex p. Caucasian Co.*, [1896] 1 Q. B. 368.

[4] Act of 1890, s. 1 ; *Burns-Burns* v. *Brown*, [1895] 1 Q. B. 324.

[5] *Ex p. Ford*, 18 Q. B. D. 369 ; *Re Connan*, 20 *id.* 690.

[6] *Re A Bankruptcy Notice*, [1898] 1 Q. B. 383.

[7] Act of 1890, s. 1.

[8] *Re Palmer*, [1898] 1 Q. B. 419.

[9] *Ex p. Moore*, 14 Q. B. D. 627 ; *Re Riddell*, 20 *id.* 512 ; *Re Binstead*, [1893] 1 Q. B. 199 ; *Re Boyd*, [1895] 1 Q. B. 611.

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been made to set aside the notice, the act of bankruptcy is complete, and it is not safe for the creditor to accept payment.

Notice of suspension.

(4.) Notice by the debtor to any of his creditors that he has suspended or is about to suspend payment of his debts.[1]

Any notice will be sufficient which is expressed in terms calculated to convey to the creditor the information that the debtor has suspended or is about to suspend payment.[2] A declaration of his inability to pay his debts may be made in terms and under circumstances which do not suggest that he means to stop payment; but it may be so expressed as to clearly imply that he does not mean to pay his debts in full, in which case it will be an act of bankruptcy.[2] The notice may be given orally.[3] This applies to non-traders as well as to traders.[4]

Property divisible amongst creditors:

The property of a bankrupt divisible among his creditors does not comprise—[5]

—Excepted property,

(1.) Property held by the bankrupt on trust for any other person;

(2.) The tools (if any) of his trade and the necessary wearing apparel and bedding for himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole.

But it does comprise—[5]

—Property divisible.

(i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and

(ii.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and

(iii.) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.

Commencement of bankruptcy

The phrase "commencement of the bankruptcy" requires explanation. The bankruptcy of the debtor is deemed "to have

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[1] Act of 1883, s. 4 (1) (h).

[2] *Crook* v. *Morley*, [1891] A. C. 316.

[3] *Ex p. Nickoll*, 13 Q. B. D. 469.

[4] *Re Scott*, [1896] 1 Q. B. 619.

[5] Act of 1883, s. 44.

—relation back of trustee's title.

relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against the bankrupt, or, if he is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition."[1]

The practical result is that after the lapse of three months an act of bankruptcy is not available, *i.e.*, the rights of all persons are the same as if it had not been committed.[2]

The trustee can transfer the bankrupt's stock, shares in ships, shares or other property transferable in the books of any company, office, or person, in the same manner as the bankrupt might have done if he had not become bankrupt;[3] and the choses in action of the bankrupt are to be deemed to have been duly assigned to the trustee.[4]

Reputed ownership—order and disposition.

The provisions as to goods "in the possession, order, or disposition of the bankrupt," sometimes called "reputed ownership," have been practically the same in all the Acts commencing with 21 Jac. 1, c. 19,[5] except that they are now expressly confined to goods in the possession, order, or disposition of the bankrupt "in his trade or business."[6]

The corresponding provision in the Act of 1869 (s. 15, sub-s. 5) applied to traders only, but did not contain the words "in his trade or business," and therefore it had a less extensive operation as to persons, but a more extensive operation as to the property affected by it.[7] Of that provision it was said[8] that it "must be read, as the similar provision in the bankruptcy statutes from the time of James I. has always been read, with some attention to common sense. It has always been construed as meaning this: that, if goods are in a man's possession, order, or disposition under

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[1] S. 43. See also s. 103 (5), amended by the Act of 1890, s. 20. Under the Act of 1869, the bankruptcy might, under certain circumstances, relate back to any act of bankruptcy committed within twelve months.

[2] See also s. 6 (1) (*e*).

[3] S. 50 (3).

[4] S. 50 (5).

[5] See the references, *ante*, p. 94, n. 6, as to the history of these provisions.

[6] See notes to *Horn* v. *Baker*, 2 Sm. L. C. 223; *Ex p. Lovering*, 24 Ch. D. 31.

[7] See, as to the difference between the Acts of 1869 and 1883 in this respect, *Re Jenkinson*, 15 Q. B. D. 441; and see *per* Cotton, L.J., *Colonial Bank* v. *Whinney*, 30 Ch. D. 274.

[8] *Per* James, L.J., *Ex p. Wingfield*, 10 Ch. D. 594.

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such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit."

These provisions do not extend to the case of factors who have possession of other men's goods merely as trustees or under a bare authority to sell them for their principal.[1]

Lord Redesdale observed,[2] commenting on an Irish Act couched in similar language :—

"Now, that clause refers to chattels in the possession of the bankrupt; 'in his order and disposition with consent of the true owner'; that means, where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconscientiously, as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of a property to which he was not entitled: but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner. . . . . In all those cases in which that clause in the Act has been permitted to have the effect of divesting the right in the person who had a right to the property, the nature of the possession has always been considered, and whether it was according to right. In cases of specific chattels, which are settled on marriage upon the husband for life, and then on the children, the possession has been with the party, the bankrupt, with the consent of the person creating the trust, and, so far, with the consent of the true owner; but the possession was according to the title, qualified by the rights of others; and wherever that has been the case, I take it, the law has never been construed to extend to destroy that right of property; but it has been confined to those cases where the sole and absolute owner of the property has permitted it to remain in possession of the trader, in whose possession it ought not to be."

The Act contains no definition of "trade or business." Mere buying or selling occasionally is not a "trade or business"; probably there must be an intention to buy and sell constantly and to make a livelihood thereby,[3] and the "trade or business" must be carried on at the commencement of the bankruptcy.[4]

"Goods" in the Act of 1883, means chattels personal,[5] including

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[1] *Mace* v. *Cadell*, Cowp. 253; *Ex p. Bright*, 10 Ch. D. 566.

[2] *Joy* v. *Campbell*, 1 Sch. & Lef. 336. See this judgment much praised by Parke, B., *Whitfield* v. *Brand*, 16 M. & W. 286. See also *Colonial Bank* v. *Whinney*, 30 Ch. D. 274, 280; 11 App. Cas. 443.

[3] *Re Wallis*, 14 Q. B. D. 950.

[4] *Ex p. M'George*, 20 Ch. D. 697; *Ex p. Salaman*, 21 Ch. D. 394.

[5] Act of 1883, s. 168.

ships,[1] but excluding fixtures, growing crops, and choses in action,[2] other than "debts due or growing due to the bankrupt in the course of his trade or business."[3]

"Debts due or growing due to the bankrupt in the course of his trade or business" include debts already contracted, whether immediately payable or not, as distinguished from contingent debts.[4]

"Possession, order, or disposition."

There is some difficulty in defining "possession, order or disposition." The words include cases where the property is in the custody of a servant of the bankrupt,[5] or is in the possession of a person to whom he has lent it,[6] or of a warehouseman, hirer, or carrier for him;[7] but not where it is in the possession of his pawnee, or of a creditor having a possessory lien,[8] or (probably) of the sheriff who has taken it in execution,[9] or of a bailiff under a distress,[10] or of a receiver appointed by the Court.[11]

Goods in the possession of a bankrupt and another are not in his order and disposition, as, for example, goods belonging to a firm are not in the order and disposition of one of the partners who becomes bankrupt.[12]

Where the property in goods at sea is changed by indorsement and delivery of the bills of lading,[13] or where the possession of goods is changed by giving a delivery order and the attornment of the bailee,[14] the goods are no longer in the order or disposition of the person transferring the bill of lading or giving the delivery order. The mere transfer of the delivery order may take the goods out of his order or disposition in cases where by the custom of the trade the bailee will not deliver up the goods without the production of the order.[15]

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[1] *Mair* v. *Glennie*, 4 M. & S. 240; but the Merchant Shipping Act, 1894, s. 36, protects a registered mortgagee.

[2] A share in a company is a chose in action for the purposes of this section; *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

[3] Act of 1883, s. 44.

[4] *Ex p. Kemp*, 9 Ch. 383.

[5] *Jackson* v. *Irvin*, 2 Camp. 48.

[6] *Ex p. Roy*, 7 Ch. D. 70; *Hornsby* v. *Miller*, 1 E. & E. 192.

[7] *Knowles* v. *Horsfall*, 5 B. & Ald. 134; *Hornsby* v. *Miller*, *sup.*; *Hervey* v. *Liddiard*, 1 Stark. 123.

[8] *Greening* v. *Clark*, 4 B. & C. 316; *Webb* v. *Whinney*, 16 W. R. 973.

[9] *Fletcher* v. *Manning*, 12 M. & W. 571; *Ex p. Foss*, 2 De G. & J. 230; *Ex p. Edey*, 19 Eq. 264; *Meggy* v. *Imperial Co.*, 3 Q. B. D. 711, 716.

[10] *Sacker* v. *Chidley*, 11 Jur. N. S. 654.

[11] *Taylor* v. *Eckersley*, 5 Ch. D. 740.

[12] *Ex p. Dorman*, 8 Ch. 51; *Ex p. Fletcher*, 8 Ch. D. 218.

[13] *Ante*, p. 68.

[14] *Ante*, p. 69.

[15] Consider *Lacon* v. *Liffen*, 4 Giff. 75.

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A debt remains in the order and disposition of the creditor after an assignment by him until notice of the assignment is given to the debtor, on the ground that, until such notice is given, the creditor is able to obtain payment of the debt to himself, and that the assignee, who is the true owner, has given his consent to the reputation of ownership remaining in the assignor.[1]

Consent.

The "consent of the true owner" is determined by his demanding possession of the goods, even if he is unable to obtain possession:[2] and the demand is sufficient if made to the bankrupt at a time when the goods are in a warehouse.[3]

The "consent" must be to possession as reputed owner.[4]

It follows that, if the possession is obtained by fraud,[5] or if it is given to the bankrupt for a special purpose only,[6] the case is not within the Act.

The consent can only be given by a person capable of giving it, and not, for instance, by an infant or a married woman restrained from anticipation.[7]

True owner.

In order to bring a case within the section there must be a true owner, as distinguished from an apparent owner.[8] Where the goods are in the possession of a trustee on an express trust, or of an executor or administrator, he is the true owner, and the section does not apply.[9] If, however, he consents to the property being in the order and disposition of another who becomes bankrupt, the section applies.[10] Trustees who have not accepted the trust or executed the trust deed are not, but the beneficiaries are, the true owners.[11]

Where a *cestui que trust* is placed in possession of specific chattels settled on him for life, the section does not apply.[12]

Mortgagee true owner.

Where goods are mortgaged, the mortgagee is the true owner.[13] Where the grantor of a bill of sale within the Bills of Sale

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[1] *Rutter* v. *Everett*, [1895] 2 Ch. 872; *Re Seaman*, [1896] 1 Q. B. 412; *Re Goetz*, [1898] 1 Q. B. 787.

[2] *Brewin* v. *Short*, 5 E. & B. 227; *Smith* v. *Topping*, 5 B. & Ad. 674.

[3] *Ex p. Ward*, 8 Ch. 144.

[4] *Smith* v. *Hudson*, 6 B. & S. 447.

[5] *Gladstone* v. *Hadwen*, 1 M. & S. 517; *Ex p. Carlon*, 4 Dea. & C. 120.

[6] *Collins* v. *Forbes*, 3 T. R. 316; *Moore* v. *Barthrop*, 1 B. & C. 5.

[7] *Re Mills*, [1895] 2 Ch. 564.

[8] *Joy* v. *Campbell*, 1 Sch. & Lef. 328.

[9] *Sinclair* v. *Wilson*, 20 Beav. 324; *Ex p. Ellis*, 1 Atk. 101.

[10] *Ex p. Dale*, Buck, 365.

[11] *Re Mills*, *supra*.

[12] *Shaftesbury* v. *Russell*, 1 B. & C. 666; *Joy* v. *Campbell*, *sup.*

[13] *Freshney* v. *Carrick*, 1 H. & N. 653; *Fraser* v. *Swansea Co.*, 1 A. & E. 354; *Ryall* v. *Rowles*, 1 Ves. Sen. 348; 1 W. & T. L. C. 96; *Colonial Bank* v. *Whinney*, 30 Ch. D. 281.

Act, 1882,[1] remains in possession as reputed owner, the section applies.[2]

And lastly, the question whether goods are in the "order and disposition" of a man, in other words, whether he is the reputed owner, is a question of fact.[3]

Lord Selborne, L.C., says:—[4]

"The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession."

Notwithstanding these remarks, it appears to be settled—

Where goods originally belong to bankrupt.

First. That where goods originally belong to the bankrupt, the fact that he remains in possession till he commits the act of bankruptcy is *primâ facie* evidence that he continues in possession as reputed owner.[5]

The rule is subject to the following exceptions:—

(*a*.) Where the goods were made by him to order, unless it was his course of business to make goods of that nature and to keep them on his premises for sale.[6]

(*b*.) Where the change of ownership is notorious, as by the

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[1] *Ante*, p. 94.

[2] *Re Ginger*, [1897] 2 Q. B. 461.

[3] *Edwards* v. *Scott*, 1 M. & Gr. 962.

[4] *Ex p. Watkins*, 8 Ch. 528.

[5] *Lingard* v. *Messiter*, 1 B. & C. 308; *Ex p. Lovering*, 9 Ch. 621; *Ex p. Brooks*, 23 Ch. D. 261.

[6] *Wilkins* v. *Bromhead*, 7 Scott, N. R. 921.

purchaser's name, or seal, or a notice, being so placed as to show that the goods belong to him.[1]

(*c.*) Where the goods are sold but not delivered, and there is a notorious[2] custom in the trade to leave them in the hands of the seller,[3] or in the warehouse in which they were at the time of sale.[4]

Where goods did not originally belong to bankrupt.

Secondly. Where the goods did not originally belong to the bankrupt, the goods are not in his order and disposition:—

(*a.*) Where he has hired them and there is a well-known custom in his trade to hire such goods.[5]

(*b.*) Where he hires a furnished house.[6]

(*c.*) In case of agistment.[7]

(*d.*) Where there is a well-known custom in the trade to send goods on sale or return,[8] or for sale on commission,[9] or for the purpose of having work done upon them.[10]

(*e.*) Where an unfinished chattel is in the hands of a manufacturer in the course of his trade.[11]

Executions.

A creditor who has issued execution against the property of a debtor, or has attached any debt due to him, cannot retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless it has been completed before the receiving order, and before notice of the presentation of the bankruptcy petition, or of any available act of bankruptcy.[12] An execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or by the appointment of a receiver.[13] These provisions are not applicable in the case of an administration order under sect. 125.[14]

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[1] *Ex p. Watkins, sup.; Shrubsole* v. *Sussams*, 16 C. B. N. S. 452.

[2] *Re Goetz*, [1898] 1 Q. B. 787.

[3] *Priestley* v. *Pratt*, L. R. 2 Ex. 101; *Re Terry*, 11 W. R. 113; *Carruthers* v. *Payne*, 5 Bing. 270; *Ex p. Dyer*, 53 L. T. 768.

[4] *Ex p. Watkins, sup.; Ex p. Vaux*, 9 Ch. 602; *Ex p. Dyer, sup.*

[5] *Horn* v. *Baker*, 2 Sm. L. C. 250; *Ex p. Powell*, 1 Ch. D. 501; *Crawcour* v. *Salter*, 18 Ch. D. 30; *Ex p. Turquand*, 14 Q. B. D. 636.

[6] *Walker* v. *Burnell*, Doug. 303; *Ashton* v. *Blackshaw*, 9 Eq. 515.

[7] *Ex p. Woodward*, 54 L. T. 683.

[8] *Ex p. Wingfield*, 10 Ch. D. 591.

[9] *Whitfield* v. *Brand*, 16 M. & W. 282.

[10] *Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. D. 264.

[11] *Holderness* v. *Rankin*, 2 De G. F. & J. 258; *Clarke* v. *Spence*, 4 A. & E. 448; *Collins* v. *Forbes*, 3 T. R. 323.

[12] Act of 1883, s. 45 (1).

[13] S. 45 (2). M. L. R. P. 383. See *Wild* v. *Southwood*, [1897] 1 Q. B. 317.

[14] *Post*, p. 332. *Hasluck* v. *Clark*, [1898] 2 Q. B. 28; *Watkins* v. *Barnard*, [1897] 2 Q. B. 52.

When goods are seized in execution, and before sale or completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff of a receiving order against the debtor, the sheriff must deliver the goods and any money seized or received to the official receiver.[1] If the execution is on a judgment exceeding 20*l.*,[2] and the goods are sold or money paid to avoid sale,[3] the sheriff must retain the net proceeds for fourteen days; if, within that time, notice is served on him of a bankruptcy petition, and a receiving order against the debtor is made thereon, or on any other petition of which the sheriff has notice, he must pay such proceeds to the official receiver or trustee.[4]

An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy; and a person who purchases in good faith from the sheriff acquires a good title against the trustee.[5]

The Act of 1883, provides[6] that:—

Avoidance of settlements;

(1.) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser[7] or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two* years after the date of the settlement, be void against the trustee in the bankruptcy; and shall, if the settlor becomes bankrupt at any subsequent time within *ten* years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement,[8] and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

—of covenants to settle after-acquired property.

(2.) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or

[1] Act of 1890, s. 11 (1). *Woolford* v. *Levy*, [1892] 1 Q. B. 772. S. 46 (1), (2), of the Act of 1883 is repealed by s. 29 of the Act of 1890.

[2] That is, "taken in execution for a sum exceeding 20*l.* in respect of a judgment"; *Ex p. Liverpool Loan Co.*, 7 Ch. 732.

[3] *Bower* v. *Hett*, [1895] 2 Q. B. 51, 337.

[4] Act of 1890, s. 11 (2). *Lole* v. *Betteridge*, [1898] 1 Q. B. 256.

[5] Act of 1883, s. 46 (3).

[6] S. 47. See as to the course of legislation on the subject of this section, *per* Cave, J., in *Re Lowndes*, 18 Q. B. D. 678; and Vaizey on Settlements, 1546.

[7] *Ex p. Hillman*, 10 Ch. D. 622.

[8] A life interest reserved to the settlor under the settlement is to be taken into account in estimating his solvency; *Re Lowndes*, 18 Q. B. D. 677.

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children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.[1]

(3.) "Settlement" shall for the purposes of this section include any conveyance or transfer of property.

The settlement is not avoided *ab initio*, but only from the date when the trustee's title accrues, and a *bonâ fide* purchaser for value from a donee under such a voluntary settlement has a good title against the trustee in bankruptcy, if he had no notice that the settlor was insolvent, though he knew that the donee claimed under a voluntary settlement.[2]

This section does not affect the validity of ante-nuptial settlements, nor of any other settlement made for value. It is not confined to formal settlements, but includes every voluntary transfer of property where it is intended to be preserved for the benefit of any person, as distinguished from a mere gift of money intended to be spent.[3] It should, however, be noted that trusts declared by a marriage settlement in favour of persons not within the consideration of marriage fall within the section.[4]

This section does not apply where an insolvent estate is being administered under sect. 125.[5]

Bonâ fide transactions without notice.

Bonâ fide transactions with the bankrupt which took place before the date of the receiving order are protected;[6] subject to the provisions of the Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in the Act invalidates:—

(*a*) Any payment by the bankrupt to any of his creditors;
(*b*) Any payment or delivery to the bankrupt;
(*c*) Any conveyance or assignment by the bankrupt for valuable consideration;
(*d*) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration,

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[1] See Vaizey on Settlements, 1552.

[2] *Re Brall*, [1893] 2 Q. B. 381; *Re Carter*, [1897] 1 Ch. 776.

[3] *Re Player*, 15 Q. B. D. 682; *Re Vansittart*, [1893] 1 Q. B. 181.

[4] *Wollaston* v. *Tribe*, 9 Eq. 44; *Smith* v. *Cherrill*, 4 Eq. 390; cf. *Mackie* v. *Herbertson*, 9 App. Cas. 303; *De Mestre* v. *West*, [1891] A. C. 264; *A.-G.* v. *Jacobs-Smith*, [1895] 2 Q. B. 341.

[5] *Re Gould*, 19 Q. B. D. 92; *post*, p. 332.

[6] Act of 1883, s. 49.

provided that the other party to any of the transactions referred to had not at the time of such transaction notice of any available act of bankruptcy[1] committed by the bankrupt before that time. A transaction which comes within the terms of this section is protected although it may be an act of bankruptcy.[2]

Disclaimer of contracts.

Before the Act of 1869 it was settled law that the mere fact of one of the parties to a contract becoming bankrupt did not of itself put an end to the contract. No doubt a man who had contracted with a bankrupt to supply goods to him was not bound to deliver them to him unless paid beforehand; and a man who had contracted to do work for the bankrupt was not bound to perform it unless his remuneration was secured. But, with these qualifications, the bankrupt's contracts subsisted, and the assignee was entitled to perform them, and if he performed them he got the benefit of them. But he was not bound to adopt a contract, or he might adopt it for a time, and afterwards, if he found that it was not beneficial, he might abandon it, and the other party had no remedy except his action against the bankrupt for breach of contract.[3] The Act of 1869[4] authorized the trustee to disclaim (*inter alia*) "unmarketable shares in companies and unprofitable contracts." It was held, on the construction of the Act, that if the trustee when called upon to disclaim a contract of the bankrupt declined to do so but carried it on, he might afterwards disclaim; in which case the other party to the contract could prove for damages for breach of contract against the bankrupt's estate under s. 31.[3] Under the Act of 1883,[5] as modified by the Act of 1890,[6] the trustee can disclaim shares or stocks in companies, unprofitable contracts, or other unsaleable and onerous property, within a limited time, except in cases where he has been requested by some person interested in the property to decide whether he will disclaim or not, and he has not disclaimed within twenty-eight days or such further time as may be allowed by the Court.

Administration in bankruptcy of estate of person dying insolvent.

The Act of 1883[7] introduced novel provisions by which creditors of a deceased debtor may obtain, on petition, an order for the administration of the estate of the deceased debtor according to the

[1] Ss. 6, 168.

[2] *Shears* v. *Goddard*, [1896] 1 Q. B. 406.

[3] See *Re Sneezum*, 3 Ch. D. 473.

[4] 32 & 33 Vict. c. 71, s. 23.

[5] S. 55.

[6] S. 13.

[7] S. 125, amended by the Act of 1890, s. 21. See *Re Williams*, 36 Ch. D. 573, 583; *Re Gould*, 19 Q. B. D. 92.

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law of bankruptcy; or, if there are pending administration proceedings in any Court, that Court may, on proof that the estate of the deceased is insufficient to pay his debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and the latter Court may then make the order for administration in bankruptcy.[1]

This does not, however, import into the administration of the estate of a deceased insolvent all the provisions of the Act, *e.g.*, the provisions of sect. 45 as to executions,[2] and of sect. 47 as to the avoidance of voluntary settlements, are not imported.[3]

Corporations and companies.

A receiving order cannot be made against a corporation or against a company registered under the Companies Act, 1862.[4]

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[1] *E.g.*, to a County Court; *Re York*, 36 Ch. D. 233.

[2] *Hasluck* v. *Clark*, [1898] 2 Q. B. 28; *Watkins* v. *Barnard*, [1897] 2 Q. B. 521. *Ante*, p. 328.

[3] *Re Gould*, 19 Q. B. D. 92; *ante*, p. 329.

[4] Act of 1883, s. 123; *ante*, p. 281.

CHAPTER XIX.

STATUTES OF LIMITATION.

At common law, apart from statute, a personal action could be maintained at any distance of time after the cause of action arose;[1] but various periods within which rights of action must be asserted have been limited by statutes, commonly called the Statutes of Limitation.

Policy of the statutes.

The foundation of such limitations of time is, it has been observed,[2] twofold:—

> "In the first place, it is thought right that a period should be assigned beyond which actions should not be brought, on the ground of probable loss of vouchers and probable loss of evidence on the part of the persons who might be attacked by others by the act of bringing stale demands against them. The Legislature thought it right, if I may so express it, by enacting the Statute of Limitations, to presume the payment of that which had remained so long unclaimed, because the payment might have taken place, and the evidence of it might be lost by reason of the persons not pursuing their rights. But there is also another ground which may be referred to as a sound reason for imposing a limit, and requiring that parties should pursue their rights with diligence, namely, the change of position between the parties who are sought to be affected by any such stale demands."

Thus, in the case in which the observations just cited were made, a demand was set up for payment of 54 years' interest, amounting to a sum largely exceeding the principal money in question; it was set up after the parties against whom it was set up had been living on the property upon which the principal was charged and spending the income of it, and applying it in various ways, in ignorance or without expectation of any such demand being made against them.

In this work we shall consider the Statutes of Limitation so far only as they relate to actions for the recovery of debts (whether

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[1] Coke, 2nd Instit. 96.

[2] *Per* Ld. Hatherley in *Thomson* v. *Eastwood*, 2 App. Cas. 215, 248. See, also, as to the objects and policy of the Statutes, M. L. R. P. 422.

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on simple contract or by specialty), and for the recovery of specific personal chattels, or damages for the conversion or detention thereof.[1]

Statutes do not extinguish right.

These statutes, it is important to observe, merely bar the remedy and do not extinguish the debt or obligation.[2] They do not protect the debtor unless he expressly claims their protection. It is optional to a defendant to set up the defence of the statutory bar, and if he does not set it up, the law will enforce the obligation.[3] Where, therefore, a defendant intends to raise the defence of lapse of time, he must expressly plead the statute.[4]

21 Jac. 1, c. 16.

The earliest Statute of Limitation as to personal actions was passed in the reign of James I.[5] As to debts on simple contract and torts, it provides that—

Actions of detinue, trover, replevin, account, debt, rent—six years.

> All actions[6] of detinue, action sur trover,[7] and replevin for taking away of goods and cattle; all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, ... or any of them, ... shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) the said actions upon the case[8] (other than for slander) and the said actions for account, and the said actions for . . . . debt, detinue, and replevin for goods or cattle, ... within six years next after the cause of such actions or suit, and not after.[9]

Debts not within this Act;

An action for arrears of rent reserved on a lease by deed,[10] or for a rentcharge,[11] or for debt founded on a statute,[12] is not within the Act.

within this Act.

Actions for a debt on a foreign judgment,[13] or money advanced on the deposit of deeds,[14] or in respect of the liability of the equitable assignee of leaseholds to perform the covenants in the

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[1] As to debts charged on land, see M. L. R. P. 435.

[2] It is otherwise as to claims to land. See M. L. R. P. 423.

[3] *Coombs* v. *Coombs*, L. R. 1 P. & M. 288. See *per* Ld. Cairns, C., in *Dawkins* v. *Penrhyn*, 4 App. Cas. 58, 59.

[4] R. S. C. Ord. XIX. r. 15.

[5] 21 Jac. 1, c. 16, s. 3.

[6] A motion in bankruptcy is, for this purpose, equivalent to an action; *Re Mansell*, 66 L. T. 245.

[7] See, as to detinue and trover, *ante*, p. 18.

[8] Trover is included in these actions, though not specifically mentioned in this part of the section; *Swayn* v. *Stephens*, Cro. Car. 245; 2 Wms. Saund. 121, n. (4).

[9] The section limits periods also in respect of actions of trespass, assault, slander, &c.

[10] *Freeman* v. *Stacy*, Hutton, 109.

[11] *Stackhouse* v. *Barnston*, 10 Ves. 467.

[12] See *post*, p. 346.

[13] *Dupleix* v. *De Roven*, 2 Vern. 540.

[14] *Brocklehurst* v. *Jessop*, 7 Sim. 438.

lease,[1] or for a debt for necessaries supplied to a lunatic,[1a], or in respect of the liability of a banker to his customers,[2] or for a dividend declared by a company,[3] are within the Act.

Merchants' accounts.

At one time doubts were entertained on the meaning of the exception as to "merchants' accounts," but at length it was determined that the exception applied only to an open or current account,[4] not to one which was stated or concluded,[5] the object of the exception being to prevent the dividing of an account still running, where part of it falls within the six years and part before.[6]

19 & 20 Vict. c. 97, s. 9.

The provisions of the 21 Jac. I. c. 16 were extended to merchants' accounts by the Mercantile Law Amendment Act, 1856, which enacted :—[7]

> All actions of account or for not accounting, and suits for such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits ; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

The statutes bar remedy, but do not extinguish the right.

As we have before observed, the statutes above cited do not destroy the right, but only bar the remedy.[8] It follows that the lien of a solicitor may be enforced after the six years ;[9] and that an executor or administrator does not commit a *devastavit* (*i.e.*, a misapplication of assets) by paying a debt barred by statute,[10] though he may not pay such a debt after administration proceedings if the residuary legatee insists on the statute being set

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[1] *Sanders* v. *Benson*, 4 Beav. 350.

[1a] *Stamford Union* v. *Bartlett*, [1899] 1 Ch. 72.

[2] *Foley* v. *Hill*, 2 H. L. C. 28.

[3] *Re Severn & Wye Co.*, [1896] 1 Ch. 559.

[4] *Sandys* v. *Blodwell*, W. Jones, 401 ; *Martin* v. *Delbo*, 1 Sid. 465.

[5] *Martin* v. *Heathcote*, 2 Eden, 169.

[6] *Welford* v. *Liddel*, 2 Ves. sen. 400. See the question discussed in the notes to *Webber* v. *Tivill*, 2 Wms. Saund. 127.

[7] 19 & 20 Vict. c. 97, s. 9. See *Knox* v. *Gye*, L. R. 5 H. L. 672.

[8] *Wainford* v. *Barker*, 1 Ld. Raym. 232, and *per* Wigram, V.-C., *Courtenay* v. *Williams*, 3 Hare, 551 ; Pollock on Contr. 622. It will be remembered that as to real estate the title of the person barred is extinguished. See M. L. R. P. 423.

[9] *Re Broomhead*, 5 D. & L. 52 ; *Higgins* v. *Scott*, 2 B. & Ad. 413 ; 36 R. R. 607.

[10] *Norton* v. *Frecker*, 1 Atk. 526 ; *Castleton* v. *Fanshaw*, Prec. Ch. 99 ; *Hill* v. *Walker*, 4 K. & J. 166 ; *Lowis* v. *Rumney*, 4 Eq. 451 ; *Re Rownson*, 29 Ch. D. 358, 362. See, as to pleading the statute in administration actions, Darby & Bos. 20 *et seq.*

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up,[1] or if it has been judicially determined that it is barred by the statute;[2] and that he may retain (*i.e.*, pay to himself as creditor) a debt barred by statute;[3] and may set off as against a pecuniary[4] legatee a debt due by him to the testator which is barred by statute.[5]

Time runs from accruer of cause of action.

The period limited by the statute begins to run from the time when the cause of action arose.[6]

Ante-nuptial debts of married woman.

In the case of an ante-nuptial debt of a married woman, for which her husband is liable, time runs in favour of the husband from the time when the cause of action accrued against the wife.[7]

"Cause of action."

To constitute a cause of action there must be a person capable of suing and a person capable of being sued;[8] but the statute does not require that there should be a continuing cause of action capable of being enforced during the whole of the six years,[9] and, if once there has been a cause of action, time will not stop running merely because during a portion of the period of six years there may be no person who can sue or no person who can be sued.[10] Therefore where both creditor and debtor are living at the time when the cause of action arises, the statute continues to operate notwithstanding the death of either creditor or debtor, and the non-existence of any executor or administrator of the deceased.[11]

When time begins to run it does not stop.

Cause of action arising after death of testator or intestate.

On the other hand, where the cause of action does not arise until after the death of one of the parties, there is no complete cause of action until there is a personal representative capable of suing or being sued, as the case may be. If the deceased appointed an executor, the time of proving the will is immaterial, for an executor derives his authority from the will and not from the probate. Therefore, before probate, an executor[12] can sue, and, if

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[1] *Re Wenham*, [1892] 3 Ch. 59.

[2] *Midgley* v. *Midgley*, [1893] 3 Ch. 282.

[3] *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hill* v. *Walker*, 4 K. & J. 166; *Re Rownson*, *sup.*

[4] *Re Taylor*, [1894] 1 Ch. 671.

[5] *Re Cordwell*, 20 Eq. 644; *Re Akerman*, [1891] 3 Ch. 212.

[6] *Per* Alderson, B., *Rhodes* v. *Smethurst*, 4 M. & W. 63.

[7] *Beck* v. *Pierce*, 23 Q. B. D. 316.

[8] *Per* Best, C.J., *Douglas* v. *Forrest*, 4 Bing. 704; 29 R. R. 695; *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352, 358. The phrase "cause of action" includes every fact which it would be necessary to prove if traversed, in order to support the plaintiff's right to the judgment of the Court; *Read* v. *Brown*, 22 Q. B. D. 128.

[9] *Per* Ld. Denman, C.J., *Rhodes* v. *Smethurst*, 6 M. & W. 355.

[10] *Per* Ld. Abinger, C. B., *Rhodes* v. *Smethurst*, 4 M. & W. 59.

[11] As to death of the creditor after the cause of action arose, see *Hickman* v. *Walker*, Willes, 27; 2 Wms. Saund. 63 *k*; *Freake* v. *Cranefeldt*, 3 My. & Cr. 499; as to death of the debtor, *Rhodes* v. *Smethurst*, 6 M. & W. 351.

[12] *Wankford* v. *Wankford*, 1 Salk. 302, 303.

he has acted as executor, can be sued, so that time begins to run as soon as the cause of action arises,[1] or, in the case of an executor defendant, from the time when he could be sued as an acting executor.[2] But an administrator derives his title solely from the grant of letters of administration by the Court,[3] and there is no complete cause of action until such grant, from the date of which grant, therefore, the period runs within which the administrator can sue or be sued.[4]

The statute 21 Jac. 1, c. 16,[5] provided that:—

Death of plaintiff or defendant, and expiration of six years.

> "If, in any of the said actions,[6] judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff . . . ; or if any of the said actions be brought by original, and the defendant therein be outlawed, and shall reverse the outlawry, in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

Upon the construction of this section it has long been decided that when an action has been commenced within the six years and the plaintiff has died during the pending of the action, his representatives may commence a new action, and in the case of the death of a defendant the plaintiff may commence a new action, within a reasonable time after probate or grant of administration, although the six years may have expired in either case.[7] This is still the rule, although the action does not now become abated by the death of either party.[7]

When the cause of action arises: executory agreements;

In an action on an executory promise the cause of action is the breach of the promise, not the damage.[8] If the promise is to pay at a future time or on the happening of a contingent event, or the performance of a condition, the cause of action arises

[1] Wms. Executors, 216, 1803; Darby & Bos. 48.

[2] *Rhodes* v. *Smethurst*, 4 M. & W. 42; 6 M. & W. 351.

[3] Wms. Executors, 342.

[4] *Murray* v. *E. I. Co.*, 5 B. & Ald. 204; 24 R. R. 325; *Pratt* v. *Swaine*, 8 B. & C. 285; *Perry* v. *Jenkins*, 1 My. & C. 118; *Burdick* v. *Garrick*, 5 Ch. 241; *Atkinson* v. *Bradford Bldg. Soc.*, 25 Q. B. D. 377.

[5] S. 4.

[6] *Ante*, p. 334.

[7] *Swindell* v. *Bulkeley*, 18 Q. B. D. 253.

[8] *Short* v. *M'Carthy*, 3 B. & Ald. 626; 22 R. R. 503; *Brown* v. *Howard*, 2 Brod. & B. 73; *Battley* v. *Faulkner*, 3 B. & Ald. 288; 22 R. R. 390; *Gould* v. *Johnson*, 2 Salk. 422; 2 Ld. Raymond, 838.

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at the time specified, or on the happening of the event, or performance of the condition.[1]

demand;

If the promise is to pay after notice, the cause of action does not arise until notice has been given.[2] But if the promise is to pay on demand, the cause of action arises at once without any demand,[3] unless the promise is to pay a collateral sum, *e.g.*, by a surety, on demand, in which case no cause of action arises until demand.[4]

debts.

The cause of action for a debt arises at the time when the debt could first be recovered by action; for it is a general rule that the statute runs from the earliest time at which an action could be brought.[5]

Goods sold on credit.

If goods are sold on credit, the cause of action arises at the time when the credit expires, not from delivery of the goods.[6]

Bill or note payable at fixed time after date:

Where a bill or note is payable at a fixed time after date, the cause of action arises at the time when it becomes due.[7]

payable at sight:

If a bill be payable at sight, the cause of action arises on the presentment of the bill.[8]

after sight or on demand.

If the bill or note is payable at a specified time after sight or demand, the cause of action arises at the expiration of that time.[9] If it is payable on demand, the cause of action arises on the making of the bill or note, because no demand is necessary.[10]

Contract of indemnity.

On a contract of indemnity the cause of action arises when the party to be indemnified is called upon to pay.[11]

Co-sureties.

In the case of a claim by one co-surety against the other for contribution, the cause of action arises when the claim of the principal creditor against the one for more than his proportionate share is established;[12] so, also, in the case of a claim for contribution by one co-trustee against the other in respect of a liability incurred by their joint default.[13]

Co-trustees.

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[1] *Fenton* v. *Emblers*, 3 Burr. 1278; *Waters* v. *Earl Thanet*, 2 Q. B. 757; *Hammond* v. *Smith*, 33 Beav. 452; *Atkinson* v. *Bradford Bldg. Soc.*, 25 Q. B. D. 377.

[2] *Atkinson* v. *Bradford Bldg. Soc.*, *sup.*

[3] *Norton* v. *Ellam*, 2 M. & W. 461, 464; *Brown* v. *Brown*, [1893] 2 Ch. 300.

[4] *Birks* v. *Trippet*, 1 Wms. Saund. 32; *Brown* v. *Brown*, *sup.*

[5] *Per* Lindley, L.J., *Reeves* v. *Butcher*, [1891] 2 Q. B. 509, 511; *Re McHenry*, [1894] 3 Ch. 290.

[6] *Helps* v. *Winterbottom*, 2 B. & Ad. 431; 36 R. R. 609.

[7] *Wittersheim* v. *Carlisle*, 1 H. Bl. 631.

[8] *Dixon* v. *Nuttall*, 1 Cr. M. & R. 307; *Holmes* v. *Kerrison*, 2 Taunt. 323; 11 R. R. 594.

[9] *Thorpe* v. *Booth*, 1 Ry. & M. 388.

[10] *Norton* v. *Ellam*, 2 M. & W. 461.

[11] *Collinge* v. *Heywood*, 9 A. & E. 633.

[12] *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

[13] *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

Dividends.

When a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder, and a cause of action immediately arises.[1]

Solicitor's bill.

The cause of action on a solicitor's bill of costs arises on the completion of the work, and the statute begins to run from that time, and not from the delivery of a signed bill of costs.[2]

Husband's liability for wife's ante-nuptial debts.

In the case of a wife's ante-nuptial debt for which the husband is liable, the cause of action is the wife's contract, and the statute runs, in favour of the husband, from the time when the cause of action accrued against the wife.[3]

Where promisor disables himself from performance: or repudiates contract before time for performance.

The rule, however, that the cause of action arises upon breach of the contract, is not universal, for in cases where a man undertakes to do an act on a future day, and before the day arrives disables himself from performing the act, or absolutely refuses to be bound by or perform his contract, and so to speak declares off the bargain himself and absolves the opposite party, it is in the option of such party at his discretion to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable and sue him for non-performance when the day arrives.[4]

Trover and conversion.

In an action for wrongfully depriving the plaintiff of goods (formerly and sometimes still called an action of trover or of trover and conversion)[5] the cause of action is the conversion, that is, some act by the defendant incompatible with a recognition on his part of the right of the plaintiff to possess,[6] notwithstanding that the plaintiff is ignorant of such right.[7]

Detinue.

In an action to recover the possession of goods which came lawfully (as, for example, by a bailment) into the possession of a defendant whose possession has since become unlawful, or who has wrongfully parted with the possession (formerly called an action of detinue), the cause of action accrues at the time when the possession becomes unlawful.[8] Thus, where title deeds are fraudulently taken by A. from the rightful owner B., and deposited by A. with a third person C., who has no knowledge that A. has no right to them, B., the

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[1] *Re Severn & Wye Co.*, [1896] 1 Ch. 559.

[2] *Coburn* v. *Colledge*, [1897] 1 Q. B. 702.

[3] *Beck* v. *Pierce*, 23 Q. B. D. 316.

[4] *Wilkinson* v. *Verity*, L. R. 6 C. P. 209; *Hochster* v. *De la Tour*, 2 E. & B. 678.

[5] *Ante*, p. 18.

[6] *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495, 498.

[7] *Granger* v. *George*, 5 B. & C. 149; *Imperial Gas Co.* v. *London Gas Co.*, 10 Ex. 39; *Edwards* v. *Clay*, 28 Beav. 145.

[8] *Plant* v. *Cotterill*, 5 H. & N. 430.

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rightful owner, has no right of action against C. until demand by B. and refusal by C. to give up the deeds; *i.e.*, until there is a claim by C. to hold them as against the owner.[1]

Where money is deposited with a person for safe custody, and not by way of loan, a cause of action does not arise until demand to return the money and refusal.[2]

Torts.

In the case of torts, if any right existing in the party damnified has been infringed, the infringement is an injury, and the law will presume that some damage resulted from it; "every injury to a right imports a damage in the nature of it, though there be no pecuniary loss."[3] In such cases the cause of action arises immediately, and the statute begins to run. Where, however, actual damage is necessary to complete the cause of action, the statute begins to run when the damage has accrued.[4]

In the case of a tort, as in that of a contract, the general rule is that where there has once been a complete cause of action against the defendant the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default of the defendant have constituted a cause of action against him are disregarded;[5] but this applies only where the prior and subsequent wrongful acts are those of the same person.[6]

Disabilities:

We have already referred to the rule that, where a cause of action has arisen and the period of limitation has begun to run, it will continue to run notwithstanding the impossibility of bringing an action. The rule applies to cases in which, after the cause of action arises, the party who would otherwise be entitled to sue falls under disability.[7] But, where the disability exists at the time when the right of action arises, the period of limitation does not begin to run until the removal of the disability, when for the first time there is a complete cause of action.

of plaintiffs;

Under the statute of 21 Jac. I. c. 16,[8] time does not begin to run against a person entitled to sue who is, at the time the cause of action accrues, an infant, married woman, or lunatic, until the disability is removed. Under that statute time did not begin to

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[1] *Spackman* v. *Foster*, 11 Q. B. D. 99; *Miller* v. *Dell*, [1891] 1 Q. B. 468.

[2] *Re Tidd*, [1893] 3 Ch. 154.

[3] *Ashby* v. *White*, 1 Sm. L. C. 231, and notes thereto.

[4] *Backhouse* v. *Bonomi*, 9 H. L. C. 503; *Darley Main Co.* v. *Mitchell*, 11 App. Cas. 127.

[5] *Per* Willes, J., *Wilkinson* v. *Verity*, L. R. 6 C. P. 209.

[6] *Miller* v. *Dell*, [1891] 1 Q. B. 468.

[7] *Per* Ld. Kenyon, C.J., *Doe* d. *Duroure* v. *Jones*, 4 T. R. 300, 310; 2 R. R. 390; *Homfray* v. *Scroope*, 13 Q. B. 509, 512; *Cotterell* v. *Dutton*, 4 Taunt. 826.

[8] S. 7.

run against a person imprisoned or beyond the seas until release or return; but these disabilities were abolished by the Mercantile Law Amendment Act, 1856.[1]

These provisions do not prevent the person entitled to sue from bringing his action during the period of disability, if he thinks fit to do so.[2]

married women.

A married woman was, by the operation of this section,[3] enabled to sue for a debt within six years after she became discovert, though the cause of action accrued more than six years before action.[4] It has been said that the effect of the Married Women's Property Act, 1882,[5] which enables a married woman to sue and be sued in all respects as if she were a *feme sole*, is to do away with the saving in her favour.[6] There is, however, no direct decision upon this point, and it is at any rate doubtful whether sect. 7 has been impliedly repealed so far as it relates to married women.[7]

Defendant "beyond the seas."

In the case of defendants, by a statute of Anne[8] it is enacted that if any person, against whom there is any one of the causes of action mentioned in sect. 3 of 21 Jac. I., c. 16, is at the time when the cause of action accrues beyond the seas, the person entitled to bring the action may do so within six years after the person liable returns[9] from beyond the seas. No part of the United Kingdom, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of Her Majesty, are "beyond the seas" for this purpose.[10] These provisions are not affected by the fact that a plaintiff can now issue a writ for service upon a defendant out of the jurisdiction.[11]

It follows that if a defendant who is beyond seas when the cause of action arises returns to England for a very short time, and even without the plaintiff's knowledge, time begins to run against the plaintiff from the time of such return.[12] A foreigner who has never been in England is within the exception.[13]

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[1] 19 & 20 Vict. c. 97, s. 10.

[2] *Strithorst* v. *Græme*, 3 Wils. 145.

[3] 21 Jac. 1, c. 16, s. 7.

[4] *Scarpellini* v. *Atcheson*, 7 Q. B. 864.

[5] 45 & 46 Vict. c. 75, s. 1 (2).

[6] Darby & Bos. p. 56; *Lowe* v. *Fox*, 15 Q. B. D. 667.

[7] See *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352.

[8] 4 Anne, c. 16, s. 19. As to the meaning of "beyond the seas" with regard to India, see *Ruckmaboye* v. *Lullhoobhoy*, 8 Moore, P. C. 4.

[9] As to how time runs if he dies beyond the seas, see *Flood* v. *Patterson*, 29 Beav. 295.

[10] 19 & 20 Vict. c. 97, s. 12.

[11] *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352.

[12] *Gregory* v. *Hurrill*, 5 B. & C. 341.

[13] *Lafond* v. *Ruddock*, 13 C. B. 813; *Strithorst* v. *Græme*, 3 Wils. 145.

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Joint debtors.

Formerly, if one or more of several joint debtors were beyond the seas when the cause of action arose, time did not begin to run in favour of any of them till the return or death of the former.[1] But in this case it is now provided by the Mercantile Law Amendment Act, 1856,[2] that a plaintiff shall not be entitled to any time within which to commence an action against one joint debtor because the other is beyond the seas at the time when the cause of action accrued. The person entitled to sue can commence an action against the joint debtor who is not beyond the seas alone;[3] and he is not barred from suing the other upon his return, although he may have recovered judgment against the joint debtor who was not beyond the seas.[2]

Foreign ambassador.

An ambassador accredited to the sovereign cannot be sued in the Courts of this country; and this immunity extends to such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country; and the Statute of Limitations does not run against his creditors during the whole of such period.[4]

Successive disabilities.

Where a person, under disability when the cause of action arises, becomes affected by a disability of another nature before the first disability ceases, time does not begin to run until the determination of the second disability.[5]

Right of executor of person dying under disability.

If a person is under disability when the cause of action accrues to him, and so continues till his death, his personal representatives have a right of action though the period of limitation elapsed in his life. There appears to be some doubt whether the personal representatives of such a person are bound by the statute, that is, whether time begins to run against them as from the death of the person whom they represent.[6] Probably, as it is only by an equitable construction of the statute that their right to maintain an action is preserved, so by the same equitable construction the limitation of time ought to be extended as against them. If this be so, where the person under disability dies, having appointed executors, time would begin to run against them from his death;

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[1] *Fannin* v. *Anderson*, 7 Q. B. 811; *Towns* v. *Mead*, 16 C. B. 123.

[2] 19 & 20 Vict. c. 97, s. 11.

[3] *Wilson* v. *Balcarres Co.*, [1893] 1 Q. B. 422.

[4] *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352.

[5] See *Musurus Bey* v. *Gadban*, *sup.* See Darby & Bos. 61.

[6] See the opinions of Parke, B., and Rolfe, B., differing on this point, in *Townsend* v. *Deacon*, 3 Ex. 706.

where he dies intestate, there is a question whether time would begin to run against his administrator from the date of his appointment or from the death.[1]

New promise to pay—acknowledgment—part payment.

The effect of the statute 21 Jac. I. c. 16 being to bar the remedy, not to extinguish the debt, a debtor may, by a new promise to pay, revive his liability,[2] even after the period of limitation has expired.[3] Such promise may be express, or implied from an acknowledgment of the debt or payment of any principal or interest. Prior to Lord Tenterden's Act (9 Geo. IV. c. 14), a verbal promise or acknowledgment was sufficient; but that Act, after reciting that various questions had arisen in actions founded on simple contracts as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the statute, provides that an acknowledgment or promise, to be sufficient to take a debt out of the operation of the statute, must be in writing signed by the party chargeable.[4]

Acknowledgment to be in writing.

By a joint debtor.

It further provides that a written acknowledgment by one of several joint contractors, or executors or administrators of a contractor, shall not deprive the others of the benefit of the statutes;[4] and that a plaintiff may recover against those of them who have given an acknowledgment or promise.[4]

Co-executor.

With regard to co-executors of a contractor, it has been decided that the effect of this section is only to prevent the one from being made personally liable by an acknowledgment given by the other; and that an acknowledgment by one only, given in his character of executor only, will bind the testator's personal estate.[5]

The effect of any payment of principal or interest made by any person is, however, preserved.[4]

Signature by agent.

By the Mercantile Law Amendment Act, 1856, a written acknowledgment, signed by a duly authorised agent, is made sufficient.[6]

Payment by a joint debtor.

By the last-mentioned Act, it is provided that payment of any principal or interest by one of several co-debtors, co-contractors, or executors or administrators of a contractor, shall not of itself

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[1] See these questions discussed, Darby & Bos. 62.

[2] See *per* Ld. Tenterden, C.J., in *Tanner* v. *Smart*, 6 B. & C. 606; 30 R. R. 461; Pollock on Contract, 625.

[3] *Re Lane*, 23 Q. B. D. 74. *Secus*, as to claims to real estate. See M. L. R. P. 431.

[4] 9 Geo. 4, c. 14, s. 1. See *Re Hollingshead*, 37 Ch. D. 657.

[5] *Re Macdonald*, [1897] 2 Ch. 181.

[6] 19 & 20 Vict. c. 97, s. 13.

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deprive the others of the benefit of the statutes.[1] If, however, the payment is made by one co-debtor under such circumstances that the payment was made by him as agent for, or at the request of, another co-debtor, the liability of the latter will be kept alive.[2]

The effect of Lord Tenterden's Act,[3] which did not make any alteration in the legal construction to be put upon promises or acknowledgments, but merely required a different mode of proof,[4] was thus stated by Mellish, L.J. :—[5]

There must be— (1) express promise, or (2) acknowledgment from which promise can be inferred.

"There must be a proof of some writing signed by himself, either containing an express promise to pay the debt, or being in terms from which an unconditional promise to pay it is necessarily to be implied. If, therefore, the writer, although he admits the existence of a debt, refuses to pay it or reserves the matter for future consideration, or refers the creditor to some third person for payment, or the like, this will not be sufficient to prevent the operation of the statute. That being the rule, there must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

To whom it must be made.

An absolute acknowledgment of the debt is sufficient, because an unconditional promise to pay may be inferred from it;[6] the acknowledgment therefore "must be to the creditor[7] or his agent, to someone who was entitled to receive payment of the debt, and to whom you could presume a promise to pay it."[8]

Acknowledgment by payment.

A part payment of principal, or a payment of interest, may also take a case out of the operation of the statute, because from such payment an acknowledgment and a promise to pay the residue may be inferred.[9] This, as has been already pointed out, is

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[1] S. 14. See *Watson* v. *Woodman*, 20 Eq. 721.

[2] *Tucker* v. *Tucker*, [1894] 3 Ch. 429.

[3] 9 Geo. 4, c. 14, s. 1. See, on this Act, the notes to *Whitcomb* v. *Whiting*, in 1 Sm. L. C. 561.

[4] *Per* Tindal, C.J., in *Haydon* v. *Williams*, 7 Bing. 166.

[5] *Re River Steamer Co.*, 6 Ch. 828. See *Green* v. *Humphreys*, 26 Ch. D. 474; *Meyerhoff* v. *Froehlich*, 4 C. P. D. 63; *Curwen* v. *Milburn*, 42 Ch. D. 424; *Bourdin* v. *Greenwood*, 13 Eq. 281; *Quincey* v. *Sharpe*, 1 Ex. D. 72; *Banner* v. *Berridge*, 18 Ch. D. 273. The cases as to promise or acknowledgment are collected in Darby & Bos. pp. 69—91.

[6] *Tanner* v. *Smart*, 6 B. & C. 603; 30 R. R. 461; *Skeet* v. *Lindsay*, 2 Ex. D. 314. Notes to *Whitcomb* v. *Whiting*, 1 Sm. L. C. 561.

[7] *Fuller* v. *Redman*, 26 Beav. 619; *Moodie* v. *Bannister*, 4 Drew. 439.

[8] *Per* Ld. Herschell, *Stamford Bank* v. *Smith*, [1892] 1 Q. B. 769.

[9] *Tanner* v. *Smart*, 6 B. & C. 603; 30 R. R. 461. Notes to *Whitcomb* v. *Whiting*, 1 Sm. L. C. 361.

excepted from the provisions of section 1 of Lord Tenterden's Act.[1]

Parke, B., explains this as follows[2]:—

"In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt;[3] secondly, it must appear that the payment was made on account of *the* debt for which the action is brought. But the case must go farther, for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes the case out of the statute is that it admits a greater debt to be due at the time of payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt."

Payment to or by agents.

The payment must be made to the creditor or to an agent of the creditor,[4] and for this purpose the *cestui que trust* is agent for the trustee;[5] it may be made by the agent of the debtor;[6] and a payment by the debtor to a third person may be sufficient if made at the creditor's request, express or implied, in part payment of the debt.[7]

What is a payment.

The payment need not actually be made in money; acceptance of goods in part payment or any arrangement which has the effect of partially discharging the debtor is sufficient.[8]

Appropriation of payments.

Where there are two or more debts owing by the debtor to the same creditor and some are barred by the statute and some not, the creditor can appropriate to the barred debts a general payment, not appropriated by the debtor, yet such payment will not revive the barred debts.[9] But the appropriation by the creditor of a

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[1] *Ante*, p. 343.

[2] *Tippets* v. *Heane*, 1 C. M. & R. 253.

[3] This may be implied from circumstances; *Burn* v. *Boulton*, 2 C. B. 476; *Evans* v. *Davies*, 4 A. & E. 840. Where payment is made in respect of an unascertained debt, evidence must be given that it was intended as *part* payment; for the debtor may have intended it to be payment in full: *Burn* v. *Boulton*, *sup.*

[4] *Evans* v. *Davies*, 4 A. & E. 840; *Hart* v. *Stephens*, 6 Q. B. 937; *Stamford Bank* v. *Smith*, [1892] 1 Q. B. 765.

[5] *Megginson* v. *Harper*, 2 Cr. & M. 322.

[6] *Jones* v. *Hughes*, 5 Ex. 104; *Newbould* v. *Smith*, 33 Ch. D. 127; *Thorne* v. *Heard*, [1895] A. C. 495. Payment by a devisee for life of interest on a simple contract debt of the testator keeps alive the creditor's right to obtain payment out of the real estate of the testator as against the remaindermen: *Re Hollingshead*, 37 Ch. D. 651.

[7] *Worthington* v. *Grimsditch*, 7 Q. B. 479.

[8] As to acceptance of goods, *Hooper* v. *Stephens*, 4 A. & E. 71; *Hart* v. *Nash*, 2 C. M. & R. 337. As to other instances, see *Moore* v. *Strong*, 1 B. N. C. 441; *Pearce* v. *Selby*, 6 Jur. 896; *Bodger* v. *Arch*, 10 Ex. 333; *Maber* v. *Maber*, L. R. 2 Ex. 153; *Burchell* v. *Hawes*, 62 L. J. Ch. 463.

[9] *Mills* v. *Fowkes*, 5 B. N. C. 455.

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general payment to the debt which is not statute barred will take that debt out of the statute.[1] The law as to the appropriation of any payment to a particular debt or item is that the debtor may, in the first instance, appropriate[2] the payment—*solvitur in modo solventis;* if he omits to do so, the creditor may make the appropriation—*recipitur in modo recipientis;* but if neither make any appropriation, the law appropriates the payment to the debt which is not barred.[3]

Where there has been an acknowledgment, or part payment, or payment of interest, the statute begins to run from the last acknowledgment or payment.

Specialty Debts—Judgment Debts—Legacies—Personal Estate of Intestates.

3 & 4 Will. 4, c. 42, s. 3—20 years.

It was enacted in 1833[4] that actions for debt for rent upon an indenture of demise,[5] and actions of covenant or debt upon any bond or other specialty, must be commenced within twenty years after the cause of action; or, in the case of a person who is under disability (*i.e.*, an infant, a married woman,[6] or a person *non compos*) at the time when the cause of action accrues, within twenty years from such disability ceasing.[7] Being in prison was not a disability under this statute, and the disability mentioned in it of being beyond seas was done away with by the Mercantile Law Amendment Act.[8] The result is that at the present day the rules as to disabilities are the same in the case of specialty as in that of simple contract debts.[9]

Statutory liability to pay money.

A statutory liability to pay money is a specialty debt within the meaning of the Act of 1833, as, for example, the liability to pay calls incurred by a member of a company under the Companies

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[1] *Nash* v. *Hodgson*, 6 De G. M. & G. 474.

[2] This may be proved by his declarations either before or after payment or by other circumstances: *Waters* v. *Tompkins*, 2 C. M. & R. 723; *Walker* v. *Butler*, 6 E. & B. 506; *Cleave* v. *Jones*, 6 Ex. 573.

[3] See *Clayton's case*, 1 Mer. 585, and Tudor's L. C., Merc. Law, 1. See *Friend* v. *Young*, [1897] 2 Ch. 421.

[4] 3 & 4 Will. 4, c. 42, s. 3.

[5] M. L. R. P. 437.

[6] As to the effect of the provisions of the Married Women's Property Act, 1882, *ante*, p. 341.

[7] 3 & 4 Will. 4, c. 42, s. 4.

[8] 19 & 20 Vict. c. 97, s. 10, *ante*, p. 341.

[9] See *ante*, p. 340, as to disabilities.

Clauses Act, 1845;[1] and the liability of a company to pay interest upon debentures under sect. 27 of the Companies Clauses Act, 1863.[2] Moneys payable by a member of a company under the Companies Act, 1862, to the company, or on the winding up of the company, are specialty debts, independently of the general law, by the express provisions of that Act.[3]

When cause of action arises.

The instant from which time begins to run under the statute is that at which the "cause of action" arises. Thus, in the case of a covenant, time begins to run from breach of the covenant;[4] and where there are successive breaches, a fresh cause of action arises on each breach, so that the statute may bar the remedy on the earlier though not on the later breaches;[5] and where the breach is continuous, a fresh cause of action continuously arises so long as the breach continues.[6] Thus a covenant for title is continuously broken so long as an adverse title exists in another person.[7]

Continuing breaches.

Acknowledgment or part payment.

If there has been any acknowledgment by writing signed by the party liable or his agent, or by payment on account of principal or interest, the person entitled may sue within twenty years after such acknowledgment; or, if the person entitled is under disability at the time of such acknowledgment, or the party making such acknowledgment is at the time beyond the seas, the person entitled may sue within twenty years after the ceasing of the disability or the return of the party from beyond the seas.[8]

Acknowledgment.

An acknowledgment under this section is different in its nature from an acknowledgment sufficient under the Statute of James. In the latter case the acknowledgment operates, as we have seen,[9] as a new promise to pay, of the same nature as the original contract; in the former case it has no such effect, for a promise not by specialty cannot operate as a renewal of a contract by specialty, but the acknowledgment merely operates so as to give further time during which the action on the specialty may be brought. It follows that it is not necessary that the acknowledgment should be made to the person entitled to payment or to his agent.[10]

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[1] 8 & 9 Vict. c. 16. *Cork and Bandon Rail. Co.* v. *Goode*, 13 C. B. 826. See *Jones* v. *Pope*, 1 Wms. Saund. 37.

[2] 26 & 27 Vict. c. 118. *Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74.

[3] 25 & 26 Vict. c. 89. ss. 16, 75. See *ante*, p. 277.

[4] *Tuckey* v. *Hawkins*, 4 C. B. 655.

[5] *Arnott* v. *Holden*, 18 Q. B. 593.

[6] *Maddock* v. *Mallet*, 12 Ir. C. L. R. 173, 192.

[7] *Kingdon* v. *Nottle*, 1 M. & S. 355; 4 M. & S. 53; 14 R. R. 462; 16 R. R. 379; *Spoor* v. *Green*, L. R. 9 Ex. 99, 117.

[8] 3 & 4 Will. 4, c. 42, s. 5.

[9] *Ante*, p. 343.

[10] *Moodie* v. *Bannister*, 4 Drew. 432.

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Real Property Limitation Act, 1874.

The Real Property Limitation Act, 1874,[1] provides that proceedings to recover any money secured by a "mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy," must be brought within twelve years next after a present right to receive the same[2] has accrued to some person capable of giving a discharge or release for the same, or after the last payment of principal or interest or acknowledgment in writing.

Mortgage debt; covenant, and collateral bond;

Under this Act the personal remedy on the covenant in a mortgage deed, as well as the remedy against the land, is barred;[3] and so also is the remedy upon a collateral bond of the mortgagor given to further secure a mortgage debt.[4]

surety;

The liability of a surety who has entered into a joint covenant with the mortgagor is within this Act; and payment of interest by the mortgagor prevents the statute running in favour of the surety.[5]

joint debtors;

It has also been decided that a debt, even a simple contract debt which is collaterally secured by a mortgage of land, is within this Act, so that payment of interest by one of two joint debtors will prevent the statute running in favour of the other.[6] The provisions of sect. 14 of the Mercantile Law Amendment Act, 1856, do not apply to this Act.[7]

Collateral bond by surety.

A collateral bond given by a surety is not, however, within this Act, and the period of limitation is twenty years under the Act of 1833.[8]

Payment of interest, by whom.

Payment of interest by an assignee[9] or tenant for life[10] of the equity of redemption, where there is a mortgage, is sufficient to prevent the remedy upon the covenant being barred.

Judgments.

The "judgment" mentioned in this Act is not restricted to judgments which operate as charges upon land, but refers to judgments generally.[11]

Legacies.

An action to recover a legacy, payable out of personal estate,

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[1] 37 & 38 Vict. c. 57, s. 8. See, generally, on this section, M. L. R. P. 435.

[2] *Hornsey* v. *Monarch Soc.*, 24 Q. B. D. 1.

[3] *Sutton* v. *Sutton*, 22 Ch. D. 511; *Re England*, [1895] 2 Ch. 820; *Re Allen*, [1898] 2 Ch. 499.

[4] *Fearnside* v. *Flint*, 22 Ch. D. 579.

[5] *Re Frisby*, 43 Ch. D. 106.

[6] *Barnes* v. *Glenton*, [1898] 2 Q. B. 223.

[7] See *Re Frisby*, *sup.*; *Barnes* v. *Glenton*, *sup.*; *ante*, p. 343.

[8] *Re Powers*, 30 Ch. D. 291.

[9] *Forsyth* v. *Bristowe*, 8 Ex. 722.

[10] *Dibb* v. *Walker*, [1893] 2 Ch. 429.

[11] *Jay* v. *Johnstone*, [1893] 1 Q. B. 189; *Hebblethwaite* v. *Peever*, [1892] 1 Q. B. 124.

from an executor is within this enactment,[1] unless the legacy is vested in the executor upon an express trust;[2] a mere constructive trust will not prevent the statute from being a bar.[2] By the Real Property Limitation Act, 1833, no arrears of interest in respect of a legacy can be recovered after six years or an acknowledgment in writing;[3] but arrears of an annuity, bequeathed payable out of personal estate, are not arrears of "interest" in respect of a legacy.[4]

Personal estate of intestate.

An action to recover the personal estate, or a share thereof, of an intestate, possessed by the personal representative, must be brought within twenty years after a present right to receive the same has accrued to a person capable of giving a discharge or release for the same, or after some part of the estate or share, or interest in respect thereof, has been accounted for or paid, or a written acknowledgment has been given.[5] A claim in respect of assets not received by the personal representative until within twenty years before action is not barred, though the claim in respect of all assets received by him before that time is barred;[6] and part payment out of assets received within twenty years will not operate as an acknowledgment of the right to assets received more than twenty years before.[6]

Acknowledgment in writing.

The acknowledgment in writing in the cases within the Real Property Limitation Act, 1874,[7] and the Law of Property Amendment Act, 1860,[8] must be signed by the person liable or his agent, and must be given to the person entitled or his agent.

Part payment.

The rules as to whether payments of principal or interest amount to an acknowledgment that more is due within the meaning of the Statute of James apply to cases falling under 3 & 4 Will. IV. c. 42; 23 & 24 Vict. c. 38; and 37 & 38 Vict. c. 57, s. 8.[9]

Actions in Equity.

The Acts of 21 Jac. I. c. 16, and 3 & 4 Will. IV. c. 42, did not in terms apply to suits in equity; but these statutes

"must be taken virtually to include Courts of Equity; for when the

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[1] 37 & 38 Vict. c. 57, s. 8.

[2] *Evans* v. *Moore*, [1891] 3 Ch. 119; *Re Barker*, [1892] 2 Ch. 491.

[3] 3 & 4 Will. 4, c. 27, s. 42.

[4] *Re Ashwell*, Joh. 112. See *Re Bannerman*, 21 Ch. D. 105.

[5] 23 & 24 Vict. c. 38, s. 13.

[6] *Sly* v. *Blake*, 29 Ch. D. 964.

[7] 37 & 38 Vict. c. 57, s. 8.

[8] 23 & 24 Vict. c. 38, s. 13.

[9] *Ante*, p. 344.

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legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in Equity, it must be taken to have contemplated that Equity followed the law: and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of Equity also."[1]

It follows that where there is both an equitable and a legal remedy, Courts exercising equitable jurisdiction are bound to the exact periods named in the statutes[2] and to give effect to all the exceptions in the statutes as to disabilities, part payment and acknowledgments.[3]

On the other hand, where the claim is not founded on a legal right, but is purely equitable and the remedy is equitable only, the Court is not in any sense bound by the provisions of the statutes. Thus, as a general rule, time does not run between trustee and *cestui que trust* where the trust is express,[4] *i.e.*, a trust which has been expressed by writing or word of mouth,[5] or has arisen because a person has assumed to act as trustee,[6] or which the parties intended to create,[7] as distinguished from a resulting, implied, or constructive trust, *i.e.*, one arising from the acts of the parties or by operation of law.[8]

Debts of married woman in respect of separate estate.

Before the Married Women's Property Act, 1882, when a married woman had contracted in respect of her separate estate, the proceedings in Equity to obtain payment out of her separate estate were held to be barred by analogy to the Statute of Limitations.[9]

Agent in fiduciary capacity.

Where an agent is sued on the ground of his being in a fiduciary capacity, the statute has no application unless the claim be for an account;[10] and where the duty of persons is to receive property and hold it for another, or to keep it until it is called for, they cannot

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[1] *Per* Lord Redesdale, *Hovenden* v. *Annesley*, 2 Sch. & Lef. 631; 9 R. R. 119. See *per* Ld. Coleridge, C.J., *Gibbs* v. *Guild*, 9 Q. B. D. 64; and *per* Jessel, M.R., *Re Greaves*, 18 Ch. D. 551. See *Re Hastings*, 35 Ch. D. 94; *Knox* v. *Gye*, L. R. 5 H. L. 656.

[2] See *per* Jessel, M.R., in *Re Greaves*, *sup.*

[3] *White* v. *Ewer*, 2 Vent. 340.

[4] The then existing law was re-enacted by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2).

[5] *Burdick* v. *Garrick*, 5 Ch. 233; *Re Bell*, 34 Ch. D. 462.

[6] *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

[7] *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 208.

[8] *Townshend* v. *Townshend*, 1 Bro. Ch. 550; *per* Grant, M.R., *Beckford* v. *Wade*, 17 Ves. 97; 11 R. R. 20; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 633; 9 R. R. 119; *Patrick* v. *Simpson*, 24 Q. B. D. 128. Cf. M. L. R. P. 432.

[9] *Hallett* v. *Hastings*, 35 Ch. D. 94.

[10] *Friend* v. *Young*, [1897] 2 Ch. 421, 430.

discharge themselves from that trust by appealing to the lapse of time.[1]

Trustee Act, 1888.

The law as to express trusts has been partially altered by the Trustee Act, 1888,[2] which provides that:—

> 1. In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy,[3] or is to recover trust property or the proceeds thereof still retained[3] by the trustee, or previously received by the trustee and converted to his use,[4] the following provisions shall apply:—
>
> (*a.*) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.
>
> (*b.*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.
>
> 2. No beneficiary as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.
>
> 3. This section shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations.

An action by a newly appointed trustee against a former trustee to compel him to make good losses arising from improper investments made more than six years before action;[5] an action by a

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[1] *Burdick* v. *Garrick*, 5 Ch. 240, 243, *per* Ld. Hatherley, C., and Giffard, L. J.; *Banner* v. *Berridge*, 18 Ch. D. 264; *Lyell* v. *Kennedy*, 14 App. Cas. 437, 454, 456, 463; and *per* Lindley, L.J., *Re Sharpe*, [1892] 1 Ch. 166; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

[2] 51 & 52 Vict. c. 59, s. 8.

[3] *Thorne* v. *Heard*, [1895] A. C. 495.

[4] *Re Gurney*, [1893] 1 Ch. 590.

[5] *Re Bowden*, 45 Ch. D. 444.

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person entitled to a share of residuary personal estate against the trustees of the will for breach of trust whereby the residue was diminished, brought more than six years after his interest had fallen into possession;[1] an action by a person entitled to residuary personal estate, brought more than six years after he came of age, against the trustees for administration, where the whole estate had been expended on the infant during his minority;[2] and an action by *cestui que trust* against trustees to compel them to make good the loss arising from breach of trust in investing upon insufficient security,[3] are barred by the above provisions.

Directors of a company are trustees in respect of moneys of the company which have come to their hands, or are under their control, and can claim the protection of the above Act in proceedings against them for misapplication of such moneys.[4]

Claim of *cestui que trust* when trustee barred.

Where a chose in action is vested in trustees on trusts, and the right of the trustees to sue at law is barred by statute, and the *cestuis que trust* are merely entitled to the benefit of an action by the trustees, their remedy is barred also; but, if they have an independent remedy in Equity against the debtor, the question whether the statutes apply depends upon whether the remedy of the *cestuis que trust* against the debtor is analogous to a legal remedy. If it is, the statutes apply; otherwise they do not apply. The only case in which the beneficiaries have such an independent remedy is where the debtor is a party to the trust, or is privy to a breach of trust; as, for example, where a settlor covenants to pay money to trustees for the purposes of the settlement,[5] or where trust moneys are improperly advanced to a person who knows that his taking them is a breach of trust,[6] or where the debtor knows that the debt is trust property and deals with it in such a manner as to prevent the *cestuis que trust* from receiving it.[7]

Fraud.

In cases of fraud, if no limitation of time is prescribed by statute, "a Court of Equity will never lay down as a general proposition, that though the fact that imposition has been practised

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[1] *Re Swain*, [1891] 3 Ch. 233.

[2] *Re Page*, [1893] 1 Ch. 304.

[3] *Re Somerset*, [1894] 1 Ch. 231.

[4] *Re Lands Allotment Co.*, [1894] 1 Ch. 616; *Re Sharpe*, [1892] 1 Ch. 154.

[5] *Burrowes* v. *Gore*, 6 H. L. C. 907.

[6] *Ernest* v. *Croysdill*, 2 De G. F. & J. 175.

[7] *Per* Lord Wensleydale, 6 H. L. C. 967.

be established, the party is too late. The true operation of length of time is by way of evidence."[1]

If the case falls within the statute, time will not begin to run against a person seeking to upset the transaction in equity on the ground of fraud or undue influence, until he discovers, or might with reasonable care have discovered, the fraud,[2] or is freed from the influence.[3] In the cases of partners, however, the one is entitled to rely on the good faith of the other, and concealed fraud by the one will prevent the operation of the statute although the other might have discovered it if he had used due caution.[4]

Where fraud is alleged in order to take the case out of the Statutes of Limitation, it is not sufficient to prove that the wrongful act was unknown to the injured person, or to show that property has been wrongfully enjoyed while the true owner is ignorant of his rights;[5] there must be abuse of a confidential position,[6] or deliberate concealment of the facts;[7] and the fraud must be that of, or in some way imputable to, the person who invokes the aid of the statute.[8]

Laches, or stale demands in equity.

Lapse of time is always considered of importance in equity, and relief may be refused on the ground of laches,[9] either in cases of fraud where the time prescribed by the statute has not elapsed since the discovery of the fraud,[10] or where the statutes do not apply.[11] For, if a person having knowledge of his rights sits still and permits other persons to acquire interests and consider themselves as owners of the property, every presumption will be made against him.[12] And staleness of demand, as distinguished from the

[1] *Morse* v. *Royal*, 12 Ves. 374; 8 R. R. 338; *Aylward* v. *Kearney*, 2 Ball & B. 463.

[2] *Blennerhassett* v. *Day*, 2 Ball & B. 118; *Charter* v. *Trevelyan*, 11 Cl. & F. 714; *Whalley* v. *Whalley*, 3 Bli. 2; *Blair* v. *Bromley*, 5 Ha. 542; 2 Ph. 354; *Browne* v. *McClintock*, L. R. 6 H. L. 456; *Gibbs* v. *Guild*, 9 Q. B. D. 59. As to the effect of the Trustee Act, 1888, see *Moore* v. *Knight*, [1891] 1 Ch. 547.

[3] *Aylward* v. *Kearney*, 2 Ball & B. 463; *Wright* v. *Vanderplank*, 2 K. & J. 1; *Austin* v. *Chambers*, 6 Cl. & F. 1; *Molony* v. *L'Estrange*, Beat. 406; *Clanricarde* v. *Henning*, 30 Beav. 175.

[4] *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474.

[5] *Dean* v. *Thwaite*, 21 Beav. 621; *Petre* v. *Petre*, 1 Drew, 397. See M. L. R. P. 425, note (*f*).

[6] *Rolfe* v. *Gregory*, 34 L. J. Ch. 274; *Alden* v. *Gregory*, 2 Ed. 280; *Gresley* v. *Mousley*, 1 Giff. 450.

[7] *Dean* v. *Thwaite*, 21 Beav. 621.

[8] *Thorne* v. *Heard*, [1895] A. C. 495.

[9] M. L. R. P. 438.

[10] *Sibbering* v. *Balcarras*, 3 De G. & Sm. 735.

[11] *Harcourt* v. *White*, 28 Beav. 303; *Thomson* v. *Eastwood*, 2 App. Cas. 215.

[12] *Per* Arden, M.R., *Pickering* v. *Stamford*, 2 Ves. jun. 280; *Erlanger* v. *New Sombrero Co.*, 3 App. Cas. 1218, 1279; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 210.

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Statute of Limitations and analogy to it, may furnish a defence in equity to an equitable demand.[1]

"Even where there is an express trust, lapse of time, coupled with other circumstances which render it unjust to give the plaintiff relief against the defendant, will induce the Court to refuse the relief, although no Statute of Limitations might bar his claim."[2]

Trust moneys lent to tenant for life.

It should be observed that, in the common case of trust moneys being improperly advanced to a tenant for life, being the person who ought to receive the income arising from them, time cannot run in his favour during his lifetime,[3] for the transaction amounts to constructive payment of interest by him.

Trust for payment of debts.

The next question for consideration is how far the creation of a trust for payment of debts affects the operation of the statutes as regards existing debts. A trust created by will for payment of the testator's debts out of his real estate does not revive a debt barred by statute in the testator's lifetime;[4] and, according to the maxim "expressio eorum quae tacite insunt nihil operatur,"[5] a trust created by will for payment of the testator's debts out of his personal estate does not exclude the operation of the statute, for the executors are by law trustees for the creditors and the will does not alter their legal liability.[6]

Effect of administration action.

Judgment in an action for administration on behalf of creditors generally, would seem to stop the operation of the statute; but the mere commencement or pendency of the action has not this effect.[7]

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[1] *Per* Lindley, L.J., *Re Sharpe*, [1892] 1 Ch. 168.

[2] *Rochefoucauld* v. *Boustead*, [1896] 1 Ch. 196, 212.

[3] *Mills* v. *Borthwick*, 11 Jur. N. S. 558; 13 W. R. 707.

[4] *Burke* v. *Jones*, 2 V. & B. 275; 13 R. R. 83; *O'Connor* v. *Haslam*, 5 H. L. C. 178.

[5] Elph. N. & C. Interp. 85.

[6] *Scott* v. *Jones*, 4 Cl. & F. 382. As to debts charged upon land, see M. L. R. P. 435, 436.

[7] *Re Greaves*, 18 Ch. D. 551, *per* Jessel, M.R., explaining *Sterndale* v. *Hankinson*, 1 Sim. 393; 27 R. R. 210.

CHAPTER XX.

DEVOLUTION OF PROPERTY ON DEATH.

Will, power of making.

THE power of making a will or testament[1] of personal property seems to have existed from a very early time.[2] In the city of London, the province of York, and the principality of Wales, there were formerly customs which restricted the testamentary power of a man who left a wife or children; but these customs have long since been abolished by statute.[3]

Nuncupative will.

At common law a will might be "nuncupative," *i.e.*, by word of mouth without writing; but by the Statute of Frauds[4] nuncupative wills of personal property exceeding in value 30*l.*, though not absolutely abolished, were subjected to such restrictions and requirements that they fell into disuse.

Statute of Frauds.

The Statute of Frauds[5] required wills of lands to be in writing signed by the devisor or by some other person in his presence and by his express directions, and to be attested and subscribed in the presence of the devisor by three or four credible witnesses; but it did not require wills of personalty to be signed or attested at all;[6] and so the law remained until the year 1837 when the Wills Act[7] provided that a will (which is defined so as to include a codicil[8]) "shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same

Wills Act, 1 Vict. c. 26. Requirements; signature; two witnesses;

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[1] See M. L. R. P. 391.

[2] See 2 Bl. 491 *et seq.*, and as to wills of land, see M. L. R. P. 391 *et seq.*

[3] As to freemen of the city of London by 11 Geo. 1, c. 18, s. 17; as to York, 4 & 5 W. & M. c. 2; 2 & 3 Anne, c. 5; as to Wales, 7 & 8 W. 3, c. 38. See the question whether the custom ever prevailed over all England discussed in Williams' on Executors, 2. And as to the custom of London, see Com. Dig. *Guardian* (G. 2); 2 Salk. 426; *Hall* v. *Hall*, 2 Vern. 277, 612, 685; Kenny on Marr. Women, 66.

[4] 29 Car. 2, c. 3, s. 19. See 4 Anne, c. 16, s. 14.

[5] 29 Car. 2, c. 3, s. 5.

[6] See cases cited in *Limbery* v. *Mason*, Com. Rep. 451.

[7] 1 Vict. c. 26, s. 9.

[8] *Ib.* s. 1. As to codicils, see M. L. R. P. 391.

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time, and such witnesses shall attest and shall subscribe the will in the presence of the testator," and of each other.[1]

"Foot or end."

The Wills Act Amendment Act, 1852,[2] in order to explain what is meant by signature "at the foot or end thereof" provides that the signature is sufficient if it is "so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will;"[3] the Act goes on to enumerate many cases of such signatures which are to be sufficient.[4] No signature, however, shall give effect to anything which follows after it, or is inserted after the signature is made.[4]

Subscription by witnesses.

The attesting witnesses must "subscribe" the will, but this does not mean that they must write their names underneath the will; it is sufficient if they have written their names upon the will with the intention of attesting the testator's signature.[5]

Alterations.

Any alteration in a will made subsequent to its execution must be executed in the same way as a will;[6] but it is sufficient if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to the alteration, or at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or some other part of the will.[6] Alterations not duly executed may, however, be made valid by a codicil confirming the will.[7]

What may be bequeathed.

As regards personal property, the Wills Act, 1837,[8] after repealing the former statutes relating to wills, enacts that every person may by his will (executed as above mentioned) dispose of all personal estate which he shall be entitled to, either at law or in equity, at the time of his death and which, if not so disposed of, would devolve upon his executor or administrator; and that the power thus given "shall extend to all contingent, executory, or other future interests in any personal estate, whether the tes-

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[1] *Wyatt* v. *Berry*, [1893] P. 5.

[2] 15 & 16 Vict. c. 24.

[3] *Ib.* s. 1. See *Margary* v. *Robinson*, 12 P. D. 8; *Re Fuller*, [1892] P. 377; *Royle* v. *Harris*, [1895] P. 163. As to nuncupative or informal wills of soldiers or sailors, see Wills Act, 1837, s. 11; and 28 & 29 Vict. c. 72; and 57 & 58 Vict. c. 60, s. 177. See Theobald on Wills, p. 48; and as to attestation, see *ib.* p. 29.

[4] *Ib.* s. 1. See Theobald on Wills, p. 24.

[5] *Roberts* v. *Phillips*, 4 E. & B. 450; *Re Streatley*, [1891] P. 172.

[6] Wills Act, 1837, s. 21.

[7] *Re Heath*, [1892] P. 253.

[8] 1 Vict. c. 26, ss. 2 and 3.

tator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested," and notwithstanding that he may become entitled to the property or interests subsequently to the execution of his will.

Gift to attesting witness.

Formerly a person to whom, or to whose wife or husband, any benefit was given by the will was considered not to be a credible witness to the will; under the Wills Act [1] such a person is a competent witness to prove the execution of the will, but the gift is void.[2] A creditor or executor may be an attesting witness.[2]

Infants.

Before the Wills Act, a boy of the age of fourteen and a girl of the age of twelve could make a valid will of personal property; but that Act provides that no will made by a person under the age of twenty-one years shall be valid.[3]

Will speaks from death as to property bequeathed.

Every will is now construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.[4] This provision has reference only to the question of what property passes by the will; it does not mean that whatever the testator says in the will is to be construed as if the will were made on the day of his death.[5]

Lapse.

If a person to whom any personal estate is bequeathed dies before the testator, the bequest fails or "lapses," except where the legatee is a child or other issue of the testator and leaves issue living at the testator's death, in which case the Wills Act provides[6] that the bequest shall take effect as if the legatee had died immediately after the death of the testator (unless a contrary intention appears by the will). This does not, however, apply where the gift is to children or other issue as a class, even if it happens that the class consists of but one individual.[7] It will be observed that the effect of this section is to make the property bequeathed part

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[1] 1 Vict. c. 26, ss. 14, 15.

[2] *Ib.* ss. 16, 17; *Re Pooley*, 40 Ch. D. 1; *Thorpe* v. *Bestwick*, 6 Q. B. D. 311.

[3] *Ib.* s. 7; see M. L. R. P. as to infants, and as to wills of married women.

[4] *Ib.* s. 24. See *Trinder* v. *Trinder*, 1 Eq. 695; *Wagstaff* v. *Wagstaff*, 8 Eq. 229; *Re Ord*, 12 Ch. D. 22; *Re Russell*, 19 Ch. D. 432. As to the general personal estate, a will was construed in the same way before the Act. See Hawkins on Wills, 17. Formerly a will did not pass land acquired by the testator after the date of the will. See M. L. R. P. 393; Hawkins on Wills, 14.

[5] *Per* Lindley, L.J., *Re Portal*, 30 Ch. D. 55. See *Bullock* v. *Bennett*, 7 De G. M. & G. 283; Hawkins on Wills, 18.

[6] 1 Vict. c. 26, s. 33. See Theobald on Wills, 642; Elph. Introd. 412.

[7] *Re Harvey*, [1893] 1 Ch. 567.

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of the estate of the original legatee and not to give it to the issue of the legatee.[1]

Joint tenancy —gifts to a class.

If there be a bequest to several persons by name (as "to A., B., and C."), or by a general description of them as a class (as "the children of A."), without more, they take jointly, and if any one of them dies before the testator, the whole gift goes to those who survive.[2] But if there be any words importing distinctness or plurality of interest among them (as "equally," "between," or "among" them, or if the "share" of any one is spoken of), they take as tenants in common.[3] If, however, the gift be to a class, though as tenants in common, the result is that the whole bequest is taken by the persons who form the class when the gift takes effect; thus, if a testator gives 1,000*l.* to "the children of A. in equal shares," this is construed as a gift to those children of A. who shall be living at the testator's death,[4] and there is no lapse by reason of the death of a child of A. before the testator, for such child is not a member of the class to whom the gift was made.

Revocation.

A will is revoked by subsequent marriage (except wills made in exercise of some powers of appointment),[5] or by another will or codicil duly executed, or by a writing declaring an intention to revoke the will and duly executed in the same manner as a will, or by burning, tearing, or otherwise destroying the will with the intention of revoking it.[6]

Revival of revoked will.

A will which has been revoked cannot be revived except by re-execution or by a codicil showing an intention to revive it.[7] When a will which has been partly revoked, and has been afterwards wholly revoked, is revived, the part which was first revoked is not revived unless such an intention appears.[8]

Executor.

Formerly[9] it was essential in a will of personalty to appoint an executor, that is, "one appointed by a man's last will and testament to have the disposing and administration of all or a part of a man's goods and chattels and to perform a man's last will and testament, according to the contents thereof."[10] And it is still usual and proper to appoint an executor or several executors; but

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[1] *Johnson* v. *Johnson*, 3 Hare, 157.
[2] Hawkins on Wills, 111.
[3] *Ib.* 112.
[4] *Ib.* 68.
[5] 1 Vict. c. 26, s. 18. See M. L. R. P. 400, 402.
[6] *Ib.* s. 20. *Cadell* v. *Wilcocks*, [1898] P. 21. See M. L. R. P. 402 *et seq.* as to revocation.
[7] *Ib.* s. 22. *Re Chilcott*, [1897] P. 223.
[8] *Ib.* s. 22. *Re Hodgkinson*, [1893] P. 339.
[9] 2 Bl. 503.
[10] Shep. Touch. 400.

if there be no executor, the Court appoints an "administrator" with the will annexed (*cum testamento annexo*).

Several executors.

A testator may appoint one executor or several. If there are several executors, they "in the eye of the law are but as one man";[1] and therefore most acts done by or to any one of them are considered as done by or to all of them; for instance, payment of a debt by or to one of them is esteemed payment by or to all;[2] and so one may make a sale or a mortgage or pledge[3] of goods or chattels of the testator.

Executor according to the tenor.

An executor may be appointed by express words, or by implication, as by declaring that a man shall have certain rights which appertain to the office of executor, in which case he is called an "executor according to the tenor."[4] The appointment may be made to begin either at the testator's death or at a future time, which may be certain, as five years after the testator's death, or when the executor shall come of age; or uncertain, as on the death or marriage of A.;[5] and the executorship may be made to last for a limited time only.[6]

Limited executorship.

The appointment of an executor may be limited in point of place, or restricted to goods in certain places,[7] or limited as to the subject-matter, *i.e.*, to goods of a particular nature.[8] But, though the authority of the executors may be thus divided, still as regards creditors they are all entitled to act as executors generally.

Executorship survives.

On the death of one of several executors, his executor is not executor of the original testator, but the office survives to the remaining executors; and, if all but one die, or if a sole executor dies, having proved the will,[9] his executors, if he has appointed

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[1] Shep. Touch. 484.

[2] *Ib. Charlton* v. *Durham*, 4 Ch. 433. *Secus*, as to one trustee, though he be also an executor, *Lee* v. *Sankey*, 15 Eq. 204.

[3] *Per* Ld. Thurlow, C., *Scott* v. *Tyler*, 2 Dick. 712, 725; *M'Leod* v. *Drummond*, 14 Ves. 353; 17 Ves. 152; 11 R. R. 41; *Jacomb* v. *Harwood*, 2 Ves. sen. 267, *per* Strange, M.R.; *Simpson* v. *Gutteridge*, 1 Madd. 616; 16 R. R. 276; *Cole* v. *Miles*, 10 Ha. 179, *post*, p. 368.

[4] Godolph. Pt. 2, c. 5, s. 2. *Brightman* v. *Keighley*, Cro. Eliz. 43; 1 Wms. Exors. Pt. 1, Bk. 3, ch. 2. For instances, see *Re Punchard*, L. R. 2 P. & M. 369; *Re Bell*, 4 P. D. 85; *Re Lush*, 13 P. D. 20; *Re Leven*, 15 P. D. 22; *Re Russell*, [1892] P. 380; *Re Wilkinson*, *ib.* 227.

[5] Swinb. Pt. 4, s. 17, pl. 1, pl. 4; 1 Wms. Exors. Pt. 1, Bk. 3, ch. 3.

[6] Swinb. Pt. 4, s. 17, pl. 1; *Pemberton* v. *Cony*, Cro. Eliz. 164.

[7] Swinb. Pt. 4, s. 18; *Velho* v. *Leite*, 3 Sw. & Tr. 456; *Re Wallich*, *ib.* 423; Y. B. 35 H. 6, 36.

[8] Dyer, 4 a; *Lynch* v. *Bellew*, 3 Phill. 424.

[9] *Isted* v. *Stanley*, Dy. 372 a.

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any, become the executors of the original testator; but the administrator[1] of an executor does not represent the original testator. Formerly, if there were several executors, one of whom proved and the rest renounced probate, and then he who proved died in the lifetime of one of those who renounced, no interest was transmitted to his executor;[2] but the law was altered by the Court of Probate Act, 1857,[3] which provides that, where a person renounces probate, his rights in respect of the executorship shall wholly cease, and the representation of the testator shall go as if he had not been appointed executor.

Executor *de son tort.*

An executor *de son tort* is a person who, not being executor or administrator of the deceased, intermeddles with his estate.[4]

Married woman executrix.

A married woman might at common law, with her husband's consent, be an executrix, but he was liable for her acts and defaults in the administration of the estate. She could, however, without his assent make a will and appoint an executor of the property of which she was executrix. Under the Married Women's Property Act, 1882,[5] a married woman may accept the office of executrix without her husband's consent, and may deal with her testator's estate as if she were a *feme sole*. Her separate estate will be liable for any of her acts or defaults as executrix and her husband will not be responsible for them unless he has acted or intermeddled in the administration.

Renunciation of probate.

A person appointed executor may renounce probate, *i.e.*, decline to act, even if in the lifetime of the testator he has agreed to act.[6] But the Court of Probate[7] may cite him to take or refuse[8] probate; and, if he administer, he will be liable to a penalty of 100*l.* and 10*l.* per cent. duty[9] if he omit to take probate within six months.

If an executor renounces probate, or, having survived the testator, dies without having taken probate, or fails to appear when cited, or appears and refuses to act, his right as executor wholly ceases, and

[1] *Post*, pp. 365, 367.

[2] *Arnold* v. *Blencowe*, 1 Cox, 426.

[3] 20 & 21 Vict. c. 77, s. 79.

[4] *Stokes* v. *Porter*, Dy. 166 b; *Robbins' Case*, Noy, 69; *Read's Case*, 5 Rep. 33 b; *Edwards* v. *Harben*, 2 T. R. 587; 1 R. R. 548; *Att.-Gen.* v. *New York Co.*, [1898] 1 Q. B. 205.

[5] 45 & 46 Vict. c. 75, ss. 18, 24. See, as to the consent of the husband in cases before the Act, *Clerke* v. *Clerke*, 6 P. D. 103.

[6] *Per* Ld. Redesdale, *Doyle* v. *Blake*, 2 Sch. & Lef. 239; 9 R. R. 76; and *per* Best, C.J., *Douglas* v. *Forrest*, 4 Bing. 704; 29 R. R. 695.

[7] 20 & 21 Vict. c. 77, s. 23. See 21 Hen. 8, c. 5, s. 8.

[8] The refusal must be by act in Court; *Long* v. *Symes*, 3 Hagg. Ecc. 776.

[9] 55 Geo. 3, c. 184, s. 37.

the representation of the testator devolves as if he had not been appointed executor;[1] though, in a proper case, a co-executor who has renounced may be allowed by the Court to retract his renunciation.[2] It follows that if he be the only person appointed executor, the case is the same as if no executor was appointed, and administration *cum testamento annexo* will be granted to another. If an executor once administers, he may be compelled to prove the will.[3] He is considered to have administered if he does any act which would, if he had not been appointed executor, have made him executor *de son tort;* or if he deals with the goods and effects of the testator in such a manner as to show an intention of taking on him the executorship; as, for instance, if he receives or releases debts due to the testator, or takes and converts to the use of himself or others the goods of the testator.[4]

When executor must prove.

Down to the time when the Court of Probate Act[5] passed, wills of personalty were required to be proved in the court of the ordinary[6] of the place where the testator dwelt, *i.e.*, the court of the bishop of the diocese.[7] Some few places, called Peculiars,[8] were exempt from the jurisdiction of the bishop, and had an ordinary of their own. A royal peculiar is one in which the jurisdiction was formerly in the Pope, and was vested in the Crown by 25 Hen. VIII. c. 19. If the deceased had, at the time of his death, *bona notabilia*, *i.e.*, effects of the value of 5*l.* or upwards,[9] in a diocese or peculiar other than that in which he died, his will had to be proved in the "Prerogative" Court of the Archbishop of the Province of Canterbury or York, as the case might be.[10] If he had goods in both provinces it was necessary to take out probate in each province. By the Court of

Court of Probate.

[1] 20 & 21 Vict. c. 77, s. 79; *Re Reid*, [1896] P. 129; 21 & 22 Vict. c. 95, s. 16.

[2] *Re Stiles*, [1898] P. 12.

[3] *Graysbrook* v. *Fox*, 1 Plow. 280 a; *Hensloe's Case*, 9 Rep. 36 b.

[4] See the cases in the Year Books collected, 1 Roll. Ab. 917.

[5] 20 & 21 Vict. c. 77.

[6] The "ordinary" is "a bishop or any other that hath ordinary jurisdiction in causes ecclesiastical"; Co. Litt. 96 a.

[7] 2nd Instit. 398. See *Marriot* v. *Marriot*, 1 Stra. 666.

[8] It is an ancient privilege of the See of Canterbury that any manors belonging to the See become peculiars of that See. In some cases the Courts Baron of Manors had jurisdiction as to probates.

[9] See the 93rd canon of 1603, which bound the Ecclesiastical Court; *More* v. *More*, 2 Atk. 157. But this canon was, perhaps, declaratory of the existing law; *Middleton* v. *Crofts*, 2 Atk. 653.

[10] 4th Instit. 335. See, as to the locality of choses in action for purposes of probate jurisdiction, *Att.-Gen.* v. *Bouwens*, 4 M. & W. 191; *Sudeley* v. *Att.-Gen.*, [1896] 1 Q. B. 354; [1897] A. C. 11; *Re Smyth*, [1898] 1 Ch. 89.

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Probate Act, 1857,[1] all jurisdiction as to granting probate of wills and letters of administration of the effects of deceased persons was vested in Her Majesty to be exercised in the Court of Probate. The jurisdiction of this Court was transferred to the High Court of Justice by the Supreme Court of Judicature Act, 1873,[2] and was assigned to the Probate, Divorce, and Admiralty Division.[3]

Probate copy of will—evidence.

If an executor has occasion to assert his right as executor in any Court he must show that he has proved the will, which he does by producing a copy of it (called the probate) under the seal of the Court in which it was proved. The probate, or (if no executor is appointed or his appointment fails) letters of administration, with the will annexed, are the proper legal evidence of the will in any question relating to personalty.[4] The original will is deposited in the custody of the Court.[5] A will, so far as it deals with real property, does not require probate, and the will itself is the proper evidence of a devise of real property,[6] though by the Court of Probate Act, 1857, it may, subject to certain conditions, be proved by the probate copy.[7]

In order to construe a will, however, the Court may look at the original will as well as the probate copy.[8]

Executor's title by will, not probate.

But the will, not the probate, gives authority to the executor; the goods of the testator vest in him from the testator's death,[9] and the probate is said to relate back to the death.[10] Before probate the executor may do any acts incident to his office, except some which relate to actions,[11] and the acts so done are good even where he dies without proving the will, if probate or letters of administration *cum testamento annexo* are ultimately granted.[12]

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[1] 20 & 21 Vict. c. 77.

[2] 36 & 37 Vict. c. 66, s. 16.

[3] *Ib.* s. 34.

[4] *Rex* v. *Netherseal*, 4 T. R. 260; *Whicker* v. *Hume*, 7 H. L. C. 124. See Dan. Ch. Pr. 603, n. (*k*); *Pinney* v. *Pinney*, 8 B. & C. 335; 32 R. R. 400.

[5] 20 & 21 Vict. c. 77, s. 66.

[6] 6 Cruise, Dig. p. 6, pl. 10; M. L. R. P. 414, 418.

[7] 20 & 21 Vict. c. 77, ss. 62, 64. See *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

[8] *Re Harrison*, 30 Ch. D. 390.

[9] *Hensloe's Case*, 9 Rep. 38 a; *Graysbrook* v. *Fox*, 1 Plow. 281; *Smith* v. *Milles*, 1 T. R. 480; *Woolley* v. *Clark*, 5 B. & Ald. 744; 24 R. R. 546; *Att.-Gen.* v. *New York Co.*, [1897] 1 Q. B. 738; [1898] 1 Q. B. 205.

[10] *Ingle* v. *Richards*, 28 Beav. 366.

[11] *Wankford* v. *Wankford*, 1 Salk. 299; Co. Litt. 292 b; *Middleton's Case*, 5 Rep. 28 b; *Wills* v. *Rich*, 2 Atk. 285.

[12] *Brazier* v. *Hudson*, 8 Sim. 67; Dy. 367 a; *Rex* v. *Stone*, 6 T. R. 295; *Fenton* v. *Clegg*, 9 Ex. 680; *Johnson* v. *Warwick*, 17 C. B. 516.

As a general rule, if an executor sues in his representative character,[1] or relies on his right to possess as executor, he must prove that he is executor by production of the probate at the hearing or earlier. Of course, if the executor has obtained possession of the goods, he may maintain an action (formerly trespass or trover) in respect of the injury done to his possession[2] without proving that he is executor.

Powers and liabilities before probate.

It must, however, be noted that an executor may before probate maintain an action of any nature, provided he obtains probate before it is necessary to produce it;[3] for, as above stated, the probate relates back to the death of the testator.

An executor named in a will can be sued as such if he has either administered, that is, intermeddled with the estate, or has proved the will by obtaining probate, but not otherwise.[4] While the validity of a will is being disputed, an administrator appointed *pendente lite* can be sued by a creditor.[5]

Assets in foreign countries.

Although probate granted in England does not enable the executor to sue in the colonies or in a foreign country, yet it is sufficient evidence of his being executor to enable him to sue in an English Court in respect of movable personal property of the deceased wherever situated.[6]

Domicile.

The law of the place where a man is domiciled[7] at the time of his death regulates the form of execution of his will, so far as regards movable personal property, and every circumstance on which its validity may depend.[8]

Where a man dies domiciled abroad, leaving a will by which he appoints executors, which will has been proved by them in the proper Court of the country in which the testator died domiciled, the Court in this country will give to them ancillary probate of a duly authenticated copy to enable them to obtain that part of the personal estate which is situated here without requiring further evidence of the validity of the will;[9] for probate or letters of

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[1] *Webb* v. *Adkins*, 14 C. B. 401.

[2] See *Pinney* v. *Pinney*, 8 B. & C. 335; 32 R. R. 400; and *ante*, p. 18.

[3] *Wills* v. *Rich*, 2 Atk. 285; 1 Roll. Ab. 917.

[4] Plow. 280; *Douglas* v. *Forrest*, 4 Bing. 704; 29 R. R. 695; *Blewitt* v. *Blewitt*, 1 Younge, 541; *Mohamidu* v. *Pitchey*, [1894] A. C. 437.

[5] *Re Toleman*, [1897] 1 Ch. 866.

[6] *Whyte* v. *Rose*, 3 Q. B. 493.

[7] *Ante*, p. 6; *post*, p. 381.

[8] Westlake, Internal. Law, 3rd ed., 103; *Hare* v. *Nasmyth*, 2 Add. 25; *Laneuville* v. *Anderson*, 2 Sw. & Tr. 24; *Re Cosnahan*, L. R. 1 P. & M. 183; *Miller* v. *James*, 3 *ib.* 4; *Enohin* v. *Wylie*, 10 H. L. C. 1.

[9] *Per* Westbury, C., *Enohin* v. *Wylie*, 10 H. L. C. 14.

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administration prove title only as to personal estate within the jurisdiction of the Court by which the probate or letters of administration are granted.[1] Scotch and Irish probates may be sealed by the English Court, and when so sealed have the same effect as if probate or administration had been granted in England.[2]

Colonial probates.

By the Colonial Probates Act, 1892,[3] the Queen may by Order in Council direct that probate or letters of administration granted by a Court in a British possession,[4] or by a British Court in a foreign country,[5] may, on being produced and a copy thereof being deposited with the Probate Division, be sealed with the seal of the Court, and thereupon shall have the like effect as if granted by the High Court. The Act contains provisions for securing the payment of probate duty in respect of that part of the estate which is subject to duty in the United Kingdom, and for payment of debts due to creditors in the United Kingdom.

Lord Kingsdown's Act.

By an Act commonly known as Lord Kingsdown's Act,[6] a will is not to be revoked, nor the construction of it altered by any subsequent change of domicile of the testator.

By the same Act[7] every will made out of the United Kingdom by a British subject,[8] whatever be his domicile at the time of making it or at his death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted to probate, if made according to the forms required by the law of the place where it was made, or by the law of the place where the testator was domiciled at the time of making it, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin; and there is a similar provision[9] as to wills made *within* the United Kingdom by a British subject according to the forms required by the law of that part of the United Kingdom where the will is made.

Exercise of power of appointment.

A will, though it may be valid under the provisions of Lord Kingdown's Act,[10] cannot operate as the exercise of a power of

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[1] Foote, Private International Jurisp., 269; *Re Vallance*, 24 Ch. D. 177; *Att.-Gen.* v. *Bouwens*, 4 M. & W. 193.

[2] As to Scotland, 21 & 22 Vict. c. 56, s. 12, as amended by 39 & 40 Vict. c. 70, ss. 41, 44; as to Ireland, 20 & 21 Vict. c. 79, s. 95.

[3] 55 Vict. c. 6.

[4] *Ib.* s. 2.

[5] *Ib.* s. 3.

[6] 24 & 25 Vict. c. 114, s. 3. The Act does not apply to the wills of aliens; *Re Von Buseck*, 6 P. D. 211; *Bloxam* v. *Favre*, 9 P. D. 130.

[7] 24 & 25 Vict. c. 114, s. 1.

[8] This includes a naturalized subject; *Re Gally*, 1 P. D. 438; *Re Lacroix*, 2 P. D. 94.

[9] 24 & 25 Vict. c. 114, s. 2.

[10] *Ib.* ss. 1, 2.

appointment by will unless it is executed in accordance with the provisions of the Wills Act, 1837.[1]

Married women.

The former practice of the Probate Court was to grant probate of the will of a married woman to the executors in respect of such personal estate as she had power to dispose of by will, and to grant letters of administration *cæterorum* to the husband; but the present practice is to grant probate or administration *cum testamento annexo* in ordinary form without any limitation or exception.[2]

Since the Married Women's Property Act, 1893,[3] the will of a married woman made during coverture need not be re-executed or re-published after determination of the coverture, whether it was made before or after the passing of that Act.[4] It takes effect as if it had been made immediately before her death.[5]

Intestacy.

In ancient times when a man died intestate the King, as *parens patriæ*, used by his ministers to seize his goods to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and, if not, those of his blood.[6] Afterwards this jurisdiction was transferred to the ordinary,[7] except in some places where it was vested in the lord of the manor. The ordinary was rendered liable by the Statute of Westminster the Second[8] to pay the debts of the intestate in the same manner that executors would be bound if he had left a will. By 31 Ed. III. stat. 1, c. 11, in case of a man dying intestate, the ordinary was directed to "depute the next and most lawful friends of the dead person intestate to administer his goods," who were to have the powers of and to be accountable as executors.[9]

Administrators.

These "lawful friends" were called "administrators." They were officers of the ordinary, and their power was derived solely from him by means of "letters of administration." The rules for determining the ordinary having jurisdiction to grant letters

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[1] 1 Vict. c. 26, ss. 9, 10. *Re Kirwan*, 25 Ch. D. 373; *Hummel* v. *Hummel*, [1898] 1 Ch. 642. See *Re Huber*, [1896] P. 209.

[2] *Per* Cotton, L.J., *Smart* v. *Tranter*, 43 Ch. D. 587, 591; *Re Atkinson*, [1898] 1 Ch. 637. But see *Re Leman*, [1898] P. 215.

[3] 56 & 57 Vict. c. 63, s. 3. For the previous law, see *Bilke* v. *Roper*, 45 Ch. D. 632; *Re Price*, 28 Ch. D. 709.

[4] *Re Wylie*, [1895] 2 Ch. 116.

[5] 1 Vict. c. 26, s. 24.

[6] *Hensloe's Case*, 9 Rep. 38 b.

[7] *Ante*, p. 361, n. 6; *Graysbrook* v. *Fox*, 1 Plow. 277; *Marriot* v. *Marriot*, Gilb. 203.

[8] 13 Ed. 1, c. 19. See *Snelling's Case*, 5 Rep. 82 b.

[9] See as to these statutes, *per* Lush, L.J., *Re Goodman*, 17 Ch. D. 276.

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of administration were the same as in the case of probate.[1] The jurisdiction of the ordinaries exercised through the proper Courts, and of all other Courts, was vested in the Court of Probate by the Probate Act, 1857.[2] The jurisdiction of this Court is now exercised by the Probate, Divorce, and Admiralty Division of the High Court of Justice.[3] Until letters of administration the personal estate vests in the judge of the Court in the same manner as it formerly vested in the ordinary.[4]

Who are entitled to letters of administration.

By 21 Hen. VIII. c. 5, s. 3, administration is to be granted "to the widow of the deceased *or* to the next of kin *or* to both as by the discretion of the ordinary shall be thought good"; and the ordinary may grant administration to one or more making request out of divers next of kin.

Husband.

A husband has the exclusive right of taking out administration to his wife.[5] The right was confirmed by the Statute of Frauds,[6] which provides that the Statute of Distributions[7] "shall not extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates and enjoy the same as they might have done before the making of the said Act."

The husband takes subject to satisfaction of any liabilities of the wife enforceable against the property.[8] If the husband die without taking out administration, the next of kin of the wife may obtain a grant of letters of administration, but will hold the beneficial interest for the personal representative of the husband.[9]

Next of kin.

The "next and most lawful friends," and "the next of kin," entitled to a grant of administration under the statutes are defined by Coke[10] to be the next of blood who are not attainted of treason felony or have any other lawful disability; but at the present day as a general rule the right to take out administration to the effects of an intestate follows the right to the property.[11]

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[1] *Ante*, p. 361.

[2] 20 & 21 Vict. c. 77.

[3] *Ante*, p. 362.

[4] 21 & 22 Vict. c. 95, s. 19.

[5] *Humphrey* v. *Bullen*, 1 Atk. 459; *Sands' Case*, 3 Salk. 22; *Johns* v. *Rowe*, Cro. Car. 106.

[6] 29 Car. 2, c. 3, s. 25.

[7] 22 & 23 Car. 2, c. 10.

[8] *Smart* v. *Tranter*, 43 Ch. D. 593, 598; *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

[9] *Smart* v. *Tranter*, 43 Ch. D. 592, 596.

[10] *Hensloe's Case*, 9 Rep. 39 b.

[11] *Per* Sir J. Nicholl, *Re Gill*, 1 Hagg. Ecc. 342.

If none of the next of kin will take out administration, a creditor may do so,[1] because he cannot be paid his debt until there is a representative of the deceased.[2] A creditor taking out administration is always required by the Court to enter into a bond to pay all debts *pro ratâ*,[3] and is thus prevented from exercising the right of "retainer."[4]

Grant to creditor.

The Court has a wide discretion as to the grant of administration, and is not bound to make the grant to the person who formerly would have been entitled to such grant.[5]

Discretion of Court.

In some cases, instead of administration being granted generally of the whole estate of the deceased, it is granted for a limited time, or for a limited purpose, or in respect of a part of the estate only. If the sole executor or next of kin is an infant, administration is granted to some other person to continue during the minority, and this is called administration *durante minore ætate*. If the sole executor or next of kin is out of the realm at the time of the decease, administration *durante absentiâ* may be granted to another to continue until the return of the executor or next of kin. If litigation is pending as to the right to probate or administration, a grant of administration *pendente lite* may be granted to continue until the litigation is determined. If there is no executor of a will, or none who will prove, the Court will grant administration *cum testamento annexo*, that is, with the will annexed. If an executor or administrator dies without having fully administered the estate, and, in the case of an executor, there is no executor of such executor, an administrator will be appointed *de bonis non administratis*, that is, to complete the administration of the estate.[6]

Limited administration.

Durante minore ætate.

Durante absentiâ.

Pendente lite.

Cum testamento annexo.

De bonis non.

A person entitled to take out administration cannot, as a general rule, act before letters of administration are granted to him, for he derives his authority solely from the Court;[7] but, as soon as administration is granted, the power of the administrator is equal to the power of an executor.[8]

Administering the estate.

"All those goods and chattels, actions and commodities, which were the deceased's in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor

What are assets.

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[1] 2 Blackstone, 505.

[2] *Elme* v. *Da Costa*, 1 Phill. 177.

[3] *Re Brackenbury*, 2 P. D. 272.

[4] As to "retainer," see *post*, p. 370.

[5] 20 & 21 Vict. c. 77, s. 73.

[6] See, as to limited administration, Williams on Executors, pp. 399—451.

[7] *Wankford* v. *Wankford*, 1 Salk. 301; *Woolley* v. *Clark*, 5 B. & Ald. 744; 25 R. R. 546.

[8] Shep. Touch. 474.

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or administrator doth get into his hands as duly belonging to him in the right of his executorship and administration, and all such things as do come to the executor and administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee."[1]

Legal and *equitable* assets.

The assets of a deceased person are either *legal* or *equitable*.

This distinction "refers to the remedies of the creditor and not to the nature of the property; and whatever assets the Court of law would, in a creditor's action, charge the executor with, must be regarded as legal assets, that is to say, every item of property which the executor has a right to recover or which vests in him merely *virtute officii*."[2] This distinction has now lost much of its importance, but is still operative in some cases, *e.g.*, with respect to an executor's or administrator's right of retainer.[3]

It need hardly be said that property of which the deceased was only a trustee,[4] or which he was bound to apply for a particular purpose,[5] is not assets in the hands of his executor or administrator. In some cases property will be assets in the hands of the executor or administrator, though it never belonged to the testator, as where he renews[6] or accepts a lease, or receives property pursuant to an agreement entered into by the deceased. Property which owing to its nature is incapable of being sold is not assets; as, for instance, a next presentation purchased by the deceased, if the church becomes void before he presents.[7]

Appointed property.

Where a testator by his will exercises a general power of appointment over property, the property appointed becomes part of his assets.[8]

Power of executor or administrator to sell or mortgage.

The executor or administrator has an absolute right to sell or mortgage[9] the personal assets of the testator or intestate, and they cannot be claimed by creditors or legatees as against the purchasers or mortgagees. If it were otherwise no one would deal with a personal representative: he must sell in order to do his duty, and

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[1] Shep. Touch. 496.

[2] *Cook* v. *Gregson*, 3 Drew. 549, *per* Kindersley, V.-C. See Williams on Executors, 1546 *et seq.*

[3] *Thompson* v. *Bennett*, 6 Ch. D. 739. *Post*, p. 370.

[4] *Parker* v. *Baylis*, 2 Bos. & P. 73; *Deering* v. *Torrington*, 1 Salk. 79.

[5] *Hassall* v. *Smithers*, 12 Ves. 119.

[6] *James* v. *Dean*, 11 Ves. 392; 8 R. R. 178; *Randall* v. *Russell*, 3 Mer. 190; 17 R. R. 56.

[7] *Per* Ld. Tenterden, C.J., *Rennell* v. *Lincoln*, 7 B. & C. 195; 36 R. R. 139; Williams on Executors, p. 1537.

[8] *Thompson* v. *Towne*, 2 Vern. 319.

[9] *Mead* v. *Orrery*, 3 Atk. 239; *Scott* v. *Tyler*, 2 Dick. 725; *M'Leod* v. *Drummond*, 17 Ves. 154; 11 R. R. 41; *Thorne* v. *Thorne*, [1893] 3 Ch. 196; *ante*, p. 359.

no one would buy if he were liable to account.[1] An executor may even dispose of a chattel specifically bequeathed,[2] so long as he has not assented to the bequest.[3]

Assets lost.

The executor or administrator has only to account for the assets that come to his hands,[4] and, if they come into his possession but are afterwards lost, he cannot be charged unless there be some wilful default on his part. He is in the position of a gratuitous bailee;[5] and he is not to be charged with the debts due to the deceased till he has received them.

Devastavit.

A "*devastavit*," or waste, in an executor or administrator is where he misapplies the assets, as by paying legacies before debts, or a debt of lower degree before one of higher degree,[6] or a debt which is unenforceable by reason of the Statute of Frauds.[7] The executor is personally liable for any *devastavit*, but only as for a simple contract debt, which may be barred by the Statute of Limitations.[8] If he has acted honestly and reasonably, he may now be relieved from personal liability by order of the Court.[9]

Assets—how to be administered.

It is the duty of the executor or administrator to pay out of the assets in the first place the reasonable expenses of the funeral.[10] If he gives orders for the funeral, or adopts the acts of another who has given such orders, he becomes *personally* liable for them.[11] Secondly, he may retain the costs of obtaining probate or letters of administration, and other costs of administering the estate.[12] Thirdly, he must pay the debts of the deceased according to their priority; *i.e.*, *first*, debts due to the Crown by record or specialty;[13]

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[1] *Whale* v. *Booth*, 4 T. R. 625 (*n*); 2 R. R. 483 (*n*); *Scott* v. *Tyler*, 2 Dick. 725; *Vane* v. *Rigden*, 5 Ch. 668, *per* Ld. Hatherley, C. It need hardly be said that an executor cannot purchase from himself; *Hall* v. *Hallet*, 1 Cox, 134; 1 R. R. 3.

[2] *Ewer* v. *Corbet*, 2 P. Wms. 149.

[3] Ld. St. Leonards, 2 V. & P. 56.

[4] *Read's Case*, 5 Rep. 33 b; *Jenkins* v. *Plombe*, 6 Mod. 181.

[5] *Job* v. *Job*, 6 Ch. D. 562. *Ante*, p. 26.

[6] See Wms. Exors., Pt. IV., Bk. 2, ch. 2, s. 2; Shep. Touch. 485.

[7] *Re Rownson*, 29 Ch. D. 358.

[8] *Ante*, p. 333. See *Thorne* v. *Kerr*, 2 K. & J. 54; *Re Gale*, 22 Ch. D. 820; *Re Marsden*, 26 Ch. D. 783; *Re Hyatt*, 38 Ch. D. 609.

[9] Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), ss. 2, 3. *Re Kay*, [1897] 2 Ch. 518.

[10] *Stacpoole* v. *Stacpoole*, 4 Dow, 227; *Anon.* Comb. 342; *Rex* v. *Wade*, 5 Pri. 621; 19 R. R. 664; *per* Jessel, M.R., *Sharp* v. *Lush*, 10 Ch. D. 472; *Re M'Myn*, 33 Ch. D. 575.

[11] *Brice* v. *Wilson*, 8 A. & E. 349, n. (*c*); *Lucy* v. *Walrond*, 3 B. N. C. 841.

[12] *Loomes* v. *Stotherd*, 1 Sim. & S. 461; 24 R. R. 209; *Sanderson* v. *Stoddart*, 32 Beav. 155; *Tanner* v. *Dancey*, 9 Beav. 339. See *Brown* v. *Burdett*, 40 Ch. D. 244.

[13] 2nd Instit. 32; *Littleton* v. *Hibbins*, Cro. Eliz. 793. See *Re Bentinck*, [1897] 1 Ch. 673; *Re Churchill*, 39 Ch. D. 174. Probate duty for which credit is given is a debt to the Crown and has priority; 55 Geo. 3, c. 184, s. 48.

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secondly, certain debts to which priority is given by statute;[1] *thirdly*, debts of record other than Crown debts;[2] *fourthly*, specialty and simple contract debts.[3]

Insolvent estate.

But, in the administration by the Court of the assets of a deceased person whose estate is insufficient for payment of his debts and liabilities, including the costs of administration,[4] the same rules are to prevail as if it were being distributed in bankruptcy.[5] In such a case priority in respect of rates and wages is given by the Preferential Payments in Bankruptcy Act, 1888.[6]

Executor or administrator may prefer a creditor.

The executor or administrator may, among creditors of equal degree, pay one in preference to another;[7] and may properly pay one creditor in full even after the commencement of an action by a creditor for administration of the estate,[8] though not after a decree for administration or the appointment of a receiver.[9] They may pay creditors of lower degree in priority to those of higher degree of which they have no notice.[10]

Retainer.

An executor or administrator may "retain," or pay to himself, a debt due to him from the deceased in preference to all other debts of equal degree,[11] or to a debt of higher degree of which he has no notice;[12] and he may exercise this right even after a decree for administration.[13] If the debt due to him exceeds the value of the assets, he need not realize the assets, but may retain them in specie.[14] There is, however, no right of retainer out of "equitable assets."[15]

Assent to legacy.

It being the duty of the executor to apply all the property devolving on him in payment of the testator's debts, no legatee acquires a perfect title to his legacy until the executor assents to

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[1] See these collected in Williams on Executors, Pt. III., Bk. 2.

[2] *Ante*, p. 152.

[3] *Ante*, p. 154.

[4] *Re Leng*, [1895] 1 Ch. 652.

[5] The Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10. See *Re Leng*, *sup.* *Ante*, p. 331.

[6] 51 & 52 Vict. c. 62, s. 1 (6). *Re Heywood*, [1897] 2 Ch. 593.

[7] *Per* Abbott, C.J., *Lyttleton* v. *Cross*, 3 B. & C. 322; 27 R. R. 370; *Vane* v. *Rigden*, 5 Ch. 669.

[8] *Re Radcliffe*, 7 Ch. D. 733; *Vibart* v. *Coles*, 24 Q. B. D. 364.

[9] *Hanson* v. *Stubbs*, 8 Ch. D. 154; *Re Wells*, 45 Ch. D. 575.

[10] *Re Fludyer*, [1898] 2 Ch. 562, 565.

[11] *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Calver* v. *Laxton*, 31 Ch. D. 440; *Re Illidge*, 24 Ch. D. 659, *per* Chitty, J.; *Re Giles*, [1896] 1 Ch. 956; *Re Beeman*, *ib.* 48; *Re Allen*, [1896] 2 Ch. 345; *Re Rownson*, 29 Ch. D. 358; *Re Bentinck*, [1897] 1 Ch. 673.

[12] *Re Fludyer*, [1898] 2 Ch. 562.

[13] See *Richmond* v. *White*, 12 Ch. D. 361.

[14] *Re Gilbert*, [1898] 1 Q. B. 282.

[15] *Thompson* v. *Bennett*, 6 Ch. D. 739. *Ante*, p. 368.

it;[1] but before the assent is given the legatee has an inchoate right which is transmissible to his personal representatives on his death before payment.[2] The assent may be express or implied, and whether it has been given is generally a question of fact.[3] It may, for instance, be implied if the legatee obtains possession of the thing bequeathed to him and retains it for some time without any complaint by the executor.[4]

Executor's year.

The executor is not bound to pay a legacy till the expiration of one year from the testator's death, even if an earlier payment is directed by the will;[5] and an administrator has a like period of delay.

Appropriation of specific assets to legacy.

An executor may appropriate a specific portion of the assets to a legatee in satisfaction of his legacy.[6]

Legacies: —specific;

Legacies are either specific, general, or demonstrative.[7]

A specific legacy is a gift of a definite thing or part of the testator's estate which the testator has clearly distinguished and separated from the rest of his estate at the time of his death,[8] and which is to be handed over in specie to the legatee; for instance, a gift of a specific chattel belonging to the testator, as "the diamond ring given to me on my marriage," or of money in a bag,[9] or of a debt or part of a debt due to the testator[10] is specific.

—specific, ademption of;

A specific legacy, if it be of a thing belonging to the testator at the date of his will, is liable to be adeemed by the testator parting with it in his lifetime, and the legatee will lose all benefit; if it be something which at the date of the will does not belong to the testator, but which he contemplates acquiring,[11] the gift will fail if he never acquires the thing.

Bearing in mind that the will speaks from the testator's death,[12]

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[1] Co. Litt. 111 a; Y. B. 11 H. 41, 84.

[2] Went. Off. Ex. 69.

[3] *Elliott* v. *Elliott*, 9 M. & W. 27; *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

[4] *Cole* v. *Miles*, 10 Ha. 179; Williams on Executors, 1225—1239.

[5] *Wood* v. *Penoyre*, 13 Ves. 333; 9 R. R. 185; *Benson* v. *Maude*, 6 Madd. 15.

[6] *Re Lepine*, [1892] 1 Ch. 210; *Re Nickels*, [1898] 1 Ch. 630; *Re Richardson*, [1896] 1 Ch. 512.

[7] See *Ashburner* v. *Macguire*, 1 W. & T. L. C. 780.

[8] *Per* Ld. Langdale, M.R., *Stephenson* v. *Dowson*, 3 Beav. 342. See *Re Ovey*, 20 Ch. D. 676; S. C. sub nom. *Robertson* v. *Broadbent*, 8 App. Cas. 812.

[9] *Lawson* v. *Stitch*, 1 Atk. 507.

[10] *Heath* v. *Perry*, 3 Atk. 101.

[11] See *Stephenson* v. *Dowson*, 3 Beav. 342; *Queen's Coll.* v. *Sutton*, 12 Sim. 521. See further as to ademption, Theobald on Wills, 127 *et seq.*

[12] Wills Act (1 Vict. c. 26), s. 24; *ante*, p. 357.

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it might be thought that where a testator, having made a specific bequest of a thing, parts with that thing, and subsequently acquires another thing which at his death answers the description of the thing bequeathed, the thing subsequently acquired would pass; but this appears not to be the case.[1]

—general;

A general legacy is a gift of something which has to be provided at the cost of the testator's estate, as "*a* diamond ring," or 100*l.* sterling, or 100*l.* Consols, or an annuity.[2] It is a legacy "which must be satisfied out of the testator's assets without reference to the nature of the property which he had at the date of his will or at the time of his death."[3]

—demonstrative.

A demonstrative legacy is one which is in its nature a general legacy, but is directed by the testator to be paid out of a particular fund;[4] for example, "1,000*l.* out of my 3 per cent. Consols."[5] It has an advantage over a general legacy, as in case of deficiency of the estate for payment of all the legacies in full, it must nevertheless be paid in full out of the fund if the fund exists; but, on the other hand, if the fund does not exist, the legacy has to be paid out of the general assets.

Income of specific legacy, or of legacy set apart.

A vested specific legacy is regarded as separated from the testator's estate and appropriated to the legatee as from the time of the testator's death; and therefore dividends or interest accruing in respect of it before it is actually paid belong to the legatee.[6] So a general legacy directed to be set aside at once on the testator's death carries interest at the rate of 4*l.* per cent. from the death.[7] But if a specific legacy is contingent, and the subject-matter of the gift is not directed to be set apart from the rest of the estate, the interim income until the happening of the contingency falls into the residue of the testator's estate, or goes to his next of kin, as the case may be;[8] if it is directed to be set apart, the interim income goes with the legacy.[8]

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[1] See *Re Portal*, 30 Ch. D. 50.

[2] As to an annuity, see *Heath* v. *Weston*, 3 De G. M. & G. 601, 606; *Cunningham* v. *Foot*, 3 App. Cas. 974, 989; Hawkins on Wills, 298.

[3] *Per* Fry, J., *Re Ovey*, 20 Ch. D. 679.

[4] See *per* Ld. Thurlow, C., *Ashburner* v. *Macguire*, 1 W. & T. L. C. 780.

[5] *Kirby* v. *Potter*, 4 Ves. 748; 4 R. R. 342. But if it had been "1,000*l. Consols* out of my 3 per cent. Consols," or "1,000*l. part of* my 3 per cent. Consols," it would be specific; *ibid.*, and *Mullins* v. *Smith*, 1 Dr. & Sm. 204. See *Re Pratt*, [1894] 1 Ch. 491.

[6] *Sleech* v. *Thorington*, 2 Ves. sen. 563; *Barrington* v. *Tristram*, 6 Ves. 345; 5 R. R. 322; *Clive* v. *Clive*, Kay, 600.

[7] *Dundas* v. *Wolfe Murray*, 1 H. & M. 425. See *Gotch* v. *Foster*, 5 Eq. 311; *Re Whittaker*, 21 Ch. D. 657.

[8] *Guthrie* v. *Walrond*, 22 Ch. D. 573, 578; *Re Woodin*, [1895] 2 Ch. 309; Theobald on Wills, 146, 153.

Interest on general legacy.

A general legacy which is immediate, that is, where payment is not to be deferred until a time named by the testator, or until the death of a person to whom the income is given for life, bears interest at the rate (if any) directed by the will, or otherwise, at 4*l.* per cent.[1] from the expiration of one year from the testator's death,[2] unless it be given to a child of the testator or other person to whom he is *in loco parentis*, in which case it bears interest from his death.[3]

A vested general legacy payable *in futuro*,[4] or a contingent general legacy[5] bears interest only from the time at which it becomes payable, unless it be to an infant child of the testator or other person to whom he is *in loco parentis*.[6]

Residue, what is.

A gift of the residuary personal estate of the testator includes every interest in his personal estate which, in the event, has not been effectually disposed of.[7] Thus, it passes lapsed and void legacies.[8] In wills made or published after 1837 it includes personal property over which the testator has a general power of appointment, and which he has by his will ineffectually appointed.[9]

If, however, a gift of a share of residue, or of the residue of residue, fails, the subject of the gift does not fall back into the residue but is undisposed of;[10] unless there is a direction that it shall fall into residue, and the residue is given to persons capable of taking it.[11]

Distribution of intestate's estate.

The Spiritual Courts, when they granted administration, endeavoured to force the administrator to distribute the residue of the intestate's effects after payment of his debts among his next of kin; but their proceedings were stopped by the Courts of Common Law,[12] the result being that the administrator was able to keep the residue for his own use. The law was altered by the

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[1] R. S. C., Ord. 55, rule 64. See Seton on Decrees, 1284.

[2] *Benson* v. *Maude*, 6 Madd. 15; *Wood* v. *Penoyre*, 13 Ves. 325, 333; 9 R. R. 185.

[3] *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372.

[4] *Tyrrell* v. *Tyrrell*, 4 Ves. 1; *Earle* v. *Bellingham*, 24 Beav. 448.

[5] *Heath* v. *Perry*, 3 Atk. 101.

[6] *Incledon* v. *Northcote*, 3 Atk. 438; *Re Moody*, [1895] 1 Ch. 101.

[7] *Bernard* v. *Minshull*, Johns. 276; *Re Bagot*, [1893] 3 Ch. 348. See Theobald on Wills, 191 *et seq.*

[8] *Cambridge* v. *Rous*, 8 Ves. 25; 6 R. R. 199; *Leake* v. *Robinson*, 2 Mer. 392; 16 R. R. 168. Hawkins on Wills, 40.

[9] *Re Spooner*, 2 Sim. N. S. 129; *Bush* v. *Cowan*, 32 Beav. 228.

[10] *Sykes* v. *Sykes*, 3 Ch. 301; *Green* v. *Pertwee*, 5 Hare, 249; *Lloyd* v. *Lloyd*, 4 Beav. 231.

[11] *Re Palmer*, [1893] 3 Ch. 369, 373.

[12] See the history of this stated, *Carter* v. *Crawley*, T. Raym. 496.

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Statute of Distributions,[1] which provided[2] for the distribution of the residue "amongst the wife and children or children's children if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks"; that is to say, one-third to the wife and two-thirds, by equal portions, to the children, and such persons as legally represent such children *per stirpes*,[3] in case any of the children be dead; but if there is no wife, the entirety is to go among the children and their representatives. Then there is a provision for any child of the intestate, other than the heir at law, bringing into hotchpot any advances made or land settled on him by the intestate.[4] If there be no children nor any "legal representatives" of them, then one moiety of the estate is to be allotted to the wife and one moiety equally to the "next of kindred" who are in equal degree. If there are neither wife nor children, the entirety is to go among the next of kindred and their "legal representatives," but no representation is to be admitted among collaterals after brothers' and sisters' children,[5] and only among them if there are brothers and sisters living.[6] It is provided by the Statute of Frauds[7] that the Statute of Distributions is not to apply to the estates of married women.

Intestates' Estates Act, 1890.

Under the Intestates' Estates Act, 1890,[8] the estate of an intestate leaving a widow but no issue, where such estate does not exceed 500*l.*, is to go absolutely to the widow, and, if the value of the estate exceeds 500*l.*, in addition to her share of the residue, she is to have a charge on it to the amount of 500*l.* with interest at the rate of 4*l.* from the intestate's death. This Act applies when a person dies without leaving a will,[9] and not, like the Statute of Distributions, to cases of partial intestacy.[9]

Statute of Distributions.

In the Statute of Distributions,[10] the words "children's children" means "*issue* of children," and children and descendants of children are distinguished from next of kin.[11] By "persons legally representing" children are meant their descendants in any degree, as distinguished from husbands or wives who survive children or their

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[1] 22 & 23 Car. 2, c. 10; see App. The Act applies to a partial intestacy; *Twisden* v. *Twisden*, 9 Ves. 413, 425; 7 R. R. 251.

[2] *Ib.* ss. 3, 5.

[3] *Re Natt*, 37 Ch. D. 517.

[4] 22 & 23 Car. 2, c. 10, s. 5.

[5] *Ib.* s. 7.

[6] *Lloyd* v. *Tench*, 2 Ves. Sen. 215.

[7] 29 Car. 2, c. 3, s. 25.

[8] 53 & 54 Vict. c. 29.

[9] *Re Twigg*, [1892] 1 Ch. 579.

[10] S. 3.

[11] *Re Natt*, 37 Ch. D. 517.

issue.[1] "Next of kindred" means next of kindred exclusive of issue of the intestate.[1] It is now settled that children and issue of deceased children take *per stirpes*, not *per capita*,[2] that is to say, the estate is divisible into as many shares as there are living children of the intestate and deceased children who have left issue; and the issue of a deceased child take between them only the share which their deceased parent would have taken. Thus, if there be one child of the intestate and three grandchildren, children of a deceased child, the child takes one-half and the three grandchildren take one-half between them. A posthumous child takes the same share as if it was born in its father's lifetime.[3]

Advancements.

The provisions as to advancement contained in the Statute of Distributions[4] apply to the estates of an intestate *father* only,[5] and to the case in which he dies without a will and not to partial intestacy.[6] The issue of a child who has been advanced cannot claim anything without bringing into hotchpot the amount advanced to that child.[7] An advancement is any sum of considerable amount paid by the father or engaged to be paid by him after his death,[8] as distinguished from sums of trivial amount, as pocket-money, a watch, or clothes,[9] or sums expended on maintenance, education, or on the travelling expenses of a child.[10] The heir at law, though he has not to bring into account the value of land which comes to him by descent or otherwise from the intestate, must bring advances of personalty into hotchpot.[11]

"Kindred."

By "kindred" is meant the connection between persons who are descended from a common ancestor.

"Lineal."

The kindred that exists between persons, one of whom is descended from the other, is called "lineal." Each generation constitutes a degree, reckoning either upwards or downwards.

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[1] *Re Natt*, 37 Ch. D. 517.

[2] *Re Natt*, *sup.*; *Re Ross*, 13 Eq. 286; overruling the opinions expressed in 2 Williams on Executors, 368, n. (*c*); and in Watkins on Descents, 4th ed., 259.

[3] *Wallis* v. *Hodson*, 2 Atk. 117.

[4] S. 5.

[5] *Holt* v. *Frederick*, 2 P. Wms. 356. The law appears to be settled, though the reasons given for the decision may not convince the reader.

[6] *Per* Sir W. Grant, *Walton* v. *Walton*, 14 Ves. 324.

[7] *Proud* v. *Turner*, 2 P. Wms. 560.

[8] *Edwards* v. *Freeman*, 2 P. Wms. 445; *Re Blockley*, 29 Ch. D. 250; *Hatfeild* v. *Minet*, 8 Ch. D. 136.

[9] Swinb. Pt. 3, s. 18, pl. 30; *Elliot* v. *Collier*, 1 Ves. sen. 15; *Pusey* v. *Desbouvrie*, 3 P. Wms. 317, note. See the cases in the preceding note.

[10] Swinb. Pt. 3, s. 18, pl. 19; *Morris* v. *Burroughs*, 1 Atk. 403.

[11] *Pratt* v. *Pratt*, Fitzgib. 284.

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Thus, there is one degree between father and son; there are two degrees between grandfather and grandson.

"Collateral."

The kindred that exists between persons, one of whom is not descended from the other, is called "collateral." The degrees are computed by reckoning from one of the parties up to the common ancestor and then down to the other, each generation constituting a degree, whether the reckoning is upwards or downwards. Thus there are two degrees between brother and sister, three between uncle and nephew. Persons of different relationship to a given person may be related to him in the same degree; thus, a great great-grandchild, a grandchild of a brother, and the daughter of an uncle are all in the same degree, viz., the fourth.

If the nearest of kin to an intestate be brothers and sisters and a grandfather or grandmother, all of whom are of the second degree, it might be thought that they would share equally; but it has been decided that the grandparent takes nothing.[1]

Intestate who leaves no wife, child, father, but mother.

If an intestate leaves no children or representatives of children, his father, if living, takes the whole, or if there be a widow, one-half; and formerly, if the intestate left no wife or child or child's representative, or father, his mother, being his sole next of kin in the first degree, was entitled to all his personal estate; but it was provided by the statute 1 Jac. 2, c. 17,[2] that in such a case "every brother and sister and the representatives of them shall have an equal share with the mother."

It has been decided on the construction of this statute 1 Jac. 2 that, if the intestate leaves a wife, the Act applies to the part not taken by her;[3] that it applies to the case where all the brothers and sisters are dead, some of them leaving children; and that the proviso in the Statute of Distributions[4] restricting representation of brothers and sisters to their children applies to the Act.[5] It will be noticed that, if the intestate leaves no wife, child, father, brother, sister, nephew or niece, the Act does not apply, and the mother takes the whole.[6]

No preference is given to next of kin of the whole blood over those of the half-blood, as in the case of descent of real estate.

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[1] *Winchelsea* v. *Norcliff*, Freem. Chanc. 95; *Evelyn* v. *Evelyn*, 3 Atk. 762.

[2] 1 Jac. 2, c. 17, s. 7.

[3] *Keylway* v. *Keylway*, 2 P. Wms. 344; Gilb. Eq. Ca. 189.

[4] 22 & 23 Car. 2, c. 10, s. 7; *ante*, p. 374.

[5] *Stanley* v. *Stanley*, 1 Atk. 455.

[6] *Jackson* v. *Prudhom*, 11 Vin. Ab. 196, tit. Exors. Z. 12.

Recapitulation.

The result of the statutory provisions is that personal estate, as to which a man, or a woman not under coverture,[1] dies intestate, is (subject to payment of debts and funeral and expenses of letters of administration and of administration) distributed as follows:—

(1.) The widow (if any) of the intestate takes one-third, if the intestate left any children or descendants of children; in every other case she takes one-half.

Subject to the rights of the widow:—

(2.) If the intestate leave any children or other lineal descendants, they take the whole *per stirpes* as above pointed out.

Thus,

(*a*) If there are children only and no descendants of any deceased child, the children take in equal shares;

(*b*) If there are children and also descendants of deceased children, the estate is divisible into as many shares as there are children and deceased children of the intestate, and the share of any deceased child goes to his or her children or remoter issue, the children of any deceased person taking the share which that person would have taken if living;

(*c*) If all the children are dead, the estate is divisible into as many shares as there were children of whom there are any living descendants, and each share is subdivided among such descendants *per stirpes*. Suppose, for instance, the intestate had two children, A. and B., both dead; A. left one child, C., who is living; B. left two children, D. and E., of whom D. is dead, leaving four children. Then C. takes one-half; E. takes one-half of the one-half which B. would have taken; the other half of B.'s share goes equally between the four children of D.

(3.) If the intestate leaves no children or descendants of any child, his father, if living, takes the whole.

(4.) If the father is dead, the mother, brothers, and sisters of the intestate take in equal shares; or, if any brother or sister be dead leaving children living, such children take the share which their deceased parent would have taken.

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[1] As we have pointed out (*ante*, p. 366) the husband of a married woman is entitled to all her personal property undisposed of. See also, *post*, Chap. XXI.

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(5.) If the mother be living, but no brother or sister, or child of any deceased brother or sister, the mother takes the whole.

(6.) If the mother be dead, the brothers and sisters, or children of deceased brothers and sisters, take the whole *per stirpes*.

(7.) If the mother and all the brothers and sisters be dead, the children of the brothers and sisters take *per capita* as next of kin together with uncles and aunts, if any.[1]

(8.) If there be no children, or remoter issue, and no father or mother, or brothers or sisters, nephews or nieces, the estate is divisible equally among such persons as are in the nearest degree of kindred to the intestate.

The phrases "next of kin" and "next of kin according to the statutes for the distribution of the estates of intestates" often occur in deeds and wills.

"Next of kin" and "next of kin according to the statutes" distinguished.

By "next of kin" *simpliciter*, are meant the nearest of kin in the strict meaning of the word; while "next of kin according to the statutes," &c., include those persons who, not being themselves next of kin, take as representing deceased next of kin;[2] and a reference to intestacy has the same effect as a reference to the statute; *e.g.*, a gift to "my next of kin as if I had died intestate."[3]

A gift to "next of kin," either *simpliciter*, or by reference to the statute or to intestacy, does not include a wife or husband.[4]

Probate duty.

Formerly an *ad valorem* stamp duty assessed on the gross value of the personal estate (including terms of years) of the deceased was imposed on Probates and Letters of Administration.[5] No allowance was made for his debts in the first instance, but after they had been paid a return of a proportional part of the duty could be obtained. But by the Customs and Inland Revenue Act, 1881,[6] the stamp is to be affixed to the affidavit which is required to be made by the person applying for probate or letters

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[1] *Durant* v. *Prestwood*, 1 Atk. 454; *Davers* v. *Dewes*, 3 P. Wms. 50.

[2] Elph. N. & C. Interp. 304 *et seq.*; Hawkins on Wills, 97.

[3] Hawkins on Wills, 99; *Akers* v. *Sears*, [1896] 2 Ch. 802. See *Re Parsons*, 45 Ch. D. 51, 63.

[4] *Ib.*, and see *Elmsley* v. *Young*, 2 My. & K. 780.

[5] 55 Geo. 3, c. 184, superseding 48 Geo. 3, c. 149, and 44 Geo. 3, c. 98, and amended by 5 & 6 Vict. c. 79, s. 23, by 22 & 23 Vict. c. 36, s. 1, and by the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), which gives the rates of Probate duty.

[6] 44 & 45 Vict. c. 12, ss. 26—30. See Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6.

of administration, and which must state the value of the estate and effects, and may also state the amounts of debts due from the deceased to persons resident in the United Kingdom and the funeral expenses, and the stamp is to be paid on the balance.

The debts due do not include certain voluntary debts, or debts in respect of which any real estate is primarily liable, or in respect of which reimbursement may be claimed from any real estate of the deceased or from any other estate or person.[1] The effect of these provisions is to prevent mortgage debts charged on realty, and debts incurred by the deceased as a surety only, from being deducted.

Only those assets of the deceased situated within the United Kingdom are liable to duty.[2] In other words, at the present day duty is to be paid only on the effects of the deceased in England. But, by statute, probate or letters of administration obtained in England, Ireland, or Scotland[3] can be made to take effect by producing them to the proper Court in any other of those countries in which they are intended to take effect and having them duly sealed or certified. If it is intended that the effect of the grant in England should be extended to Ireland or Scotland, duty is payable on the affidavit made to obtain probate or administration in England in respect of all the property of the deceased in the United Kingdom.[4] Duty is payable in respect of property passing under a general power exercised by will.[5]

Estate duty.

Now, by the Finance Act, 1894,[6] "estate duty"[7] is payable upon the whole of the property passing upon the death of any person at graduated rates.[8] For the purpose of determining the rate of duty, the whole property is aggregated so as to form one estate,[8] and the executor or administrator has to pay the duty at

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[1] 44 & 45 Vict. c. 12, s. 28. Finance Act, 1894, s. 7.

[2] *Att.-Gen.* v. *Hope*, 2 Cl. & F. 84; *Att.-Gen.* v. *Bouwens*, 4 M. & W. 171; *Re Commercial Bank of India*, 5 Ch. 314.

[3] Called "confirmations" in Scotland.

[4] 20 & 21 Vict. c. 79, ss. 94, 95; 21 & 22 Vict. c. 56, ss. 12—15; 22 & 23 Vict. c. 31, s. 25; 39 & 40 Vict. c. 70, ss. 41, 44. Special provisions have been made as to ships at sea by 27 & 28 Vict. c. 56, s. 4; as to Indian enfaced paper registered in London by 23 Vict. c. 5, s. 1; as to bond debts by 25 Vict. c. 22, s. 39; as to officers and soldiers dying on service by 56 & 57 Vict. c. 5; as to military prize-money by 27 & 28 Vict. c. 36; as to merchant seamen, 57 & 58 Vict. c. 60, s. 178.

[5] 23 Vict. c. 15, s. 4. It was formerly not payable on such property; *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257.

[6] 57 & 58 Vict. c. 30.

[7] *Ib.* s. 1.

[8] *Ib.* s. 4. Except in estates of less than 1,000*l.*, s. 16.

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that rate upon the personal property of the deceased.[1] The graduated rate of duty varies from one per cent. to eight per cent. according to the aggregate value of the estate.[2]

Legacy duty.

On the payment of a legacy the legatee must give a receipt which is chargeable with an *ad valorem* duty on the amount of the legacy.[3] The rule is the same whether the legacy is payable out of the testator's own property or out of property over which he had a general power of appointment.[4] Legacy duty is imposed also on the residue, or a share of the residue of the personal estate of both testators and intestates;[5] and "legacy" formerly included moneys to arise from the sale, mortgage, or disposition of real estate directed by any will to be so dealt with,[6] but this is no longer the case.[7]

The amount of duty is regulated by several Acts,[8] the effect of which is that brothers and sisters and their descendants pay duty at the rate of 3*l.* per cent., uncles and aunts and their descendants duty at the rate of 5*l.* per cent., great uncles and aunts and their descendants duty at the rate of 10*l.* per cent., all more remote relations and strangers in blood duty at 10*l.* per cent. Legatees under the will of a testator, if married to a person more nearly related to him than themselves, pay duty at the rate at which their husbands or wives would pay.[9] The husband or wife of the deceased and the royal family are exempt from duty. The duty of 1*l.* per cent. formerly payable on legacies to lineal descendants or lineal ancestors is not now in force.[10] Formerly, legacies under 20*l.* were free from duty.[11]

Succession duty.

Leaseholds for years, and legacies charged on or payable out of moneys to arise from the sale or mortgage of land, are not now subject to legacy duty, but are subject to succession duty.[7]

Probate duty and legacy duty distinguished.

The object of the Acts imposing probate duty, now "estate duty," is to tax the property to which title is given or perfected by

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[1] 57 & 58 Vict. c. 30, s. 6.

[2] *Ib.* s. 17, as amended by s. 17 of the Finance Act, 1896 (59 & 60 Vict. c. 28).

[3] 36 Geo. 3, c. 52, s. 27.

[4] 8 & 9 Vict. c. 76, s. 4; *Att.-Gen.* v. *Hertford*, 3 Ex. 670; *Re Cholmondeley*, 1 Cr. & M. 149.

[5] 55 Geo. 3, c. 184, Sched., Pt. 3.

[6] 45 Geo. 3, c. 28, s. 1.

[7] 16 & 17 Vict. c. 51, s. 19; 51 & 52 Vict. c. 8, s. 21 (2).

[8] 55 Geo. 3, c. 184. The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 11; the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), ss. 36, 41—43; and 51 & 52 Vict. c. 8, s. 21.

[9] 16 & 17 Vict. c. 51, s. 11.

[10] Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 41.

[11] This exemption was removed by 44 Vict. c. 12, s. 42.

the letters of administration or by the probate, and to levy that tax prior to administration; while the object of the imposition of legacy duty is to tax the property actually taken by the successors of the deceased and to levy that tax at the time when the enjoyment accrues.[1]

Domicile.

Domicile.

"Domicile" is popularly used in the meaning of the place where a man lives or where he has his home. The various meanings in which the word is used in law, whether for ascertaining rights of succession, rights of belligerents, the forum of jurisdiction, or trading privileges, are closely connected with the idea of home. When the word is used with reference to questions of succession, "the domicile of a person is the place where he has his true fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)."[2] When used in this meaning, domicile must be distinguished from "residence," for a man may have several residences, though he can have but one domicile, and, as an infant has the domicile of his parents, it is possible for a person to be domiciled in a place in which he has never resided or even been.[3]

"Domicile," as applied to cases of succession, may mean (1) domicile of origin, or (2) domicile by operation of law, or (3) domicile of choice.

1. Domicile of origin.

1. The domicile of origin of a legitimate child is the domicile of his father; of an illegitimate child (and probably of a posthumous child) is the domicile of his mother at the time of his birth.[4] If a child is born while his parents are temporarily absent from home, the place of his birth is not his domicile of origin.[5]

2. Domicile by operation of law. Wife.

2. By marriage it becomes the duty of the wife to live with her husband, and therefore she acquires his domicile,[6] not only as a matter of law, but, if she lives with him, as a matter of fact her domicile changes with his,[7] and she is unable during the coverture to acquire a domicile different from his, even if she is living apart

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[1] *Blackwood* v. *The Queen*, 8 App. Cas. 90.

[2] Story, Conflict of Laws, § 41. See *Re Craignish*, [1892] 3 Ch. 180.

[3] *Walcot* v. *Botfield*, Kay, 534.

[4] *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441. See *Re Craignish*, [1892] 3 Ch. 180.

[5] Story, Conflict of Laws, § 46.

[6] *Dalhousie* v. *M'Douall*, 7 Cl. & F. 817; *Harvey* v. *Farnie*, 8 App. Cas. 43.

[7] *Turner* v. *Thompson*, 13 P. D. 37; *Re De Nicols*, [1898] 2 Ch. 60.

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from him under the provisions of a separation deed.[1] On the other hand, if her husband has ceased to have the right to control her actions owing to her having been divorced *a vinculo matrimonii*, she can acquire a domicile different from his;[2] but it is doubtful whether a divorce *a mensâ et thoro*,[3] or a judicial separation under 20 & 21 Vict. c. 85,[4] enables her to acquire a domicile different from his.

Infant child.

In like manner, the father of a legitimate infant child has the right to control its actions, and therefore the domicile of such a child changes with that of its father.[5] After the death of the father, the domicile of an infant child generally, but not necessarily, changes with that of the mother if the child is living with her, until she re-marries;[6] the mother has the power to change the domicile of the child by changing her own, but may refrain from exercising that power.[6] The question is hardly settled whether a guardian has the power of changing the domicile of his ward.[7]

3. Domicile of choice.

3. A person *sui juris* may change his domicile whenever and as often as he likes, but in order to change his domicile he must not only intend to do so, but he must actually do so. In other words a new domicile, called domicile of choice, is acquired by the combination of residence and the intention to permanently reside in a given country, but not otherwise. There may be some doubt whether it is not also necessary that the person should have the intention of incorporating himself with the population of the country where he takes up his residence, so that the application of its law to him is in accordance with his wishes.[8]

The domicile of choice continues until another domicile has been acquired.[9]

Ambassadors. Public servants.

The domicile of an ambassador or *chargé d'affaires*, and of the members of his suite, or of any person in the civil or military service of the Crown, is not changed by his service abroad.[10]

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[1] *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Re Daly*, 25 Beav. 456.

[2] Westlake, Private International Law, § 253.

[3] *Williams* v. *Dormer*, 2 Rob. 505.

[4] *Dolphin* v. *Robins*, 7 H. L. C. 390.

[5] *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611; *Re Craignish*, [1892] 3 Ch. 180.

[6] *Potinger* v. *Wightman*, 3 Mer. 67; 17 R. R. 20; *Johnstone* v. *Beattie*, 10 Cl. & F. 138; *Re Beaumont*, [1893] 3 Ch. 490.

[7] *Potinger* v. *Wightman*, *sup.*; *Douglas* v. *Douglas*, 12 Eq. 625; Story, Conflict of Laws, § 505.

[8] *Moorhouse* v. *Lord*, 10 H. L. C. 272; Westlake, Private International Law, p. 304.

[9] *Urquhart* v. *Butterfield*, 37 Ch. D. 357; *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441; *Moorhouse* v. *Lord*, *sup.*

[10] *Douglas* v. *Douglas*, 12 Eq. 617; *Att.-Gen.* v. *Napier*, 6 Ex. 217; *Brown*

It also appears that an officer who is not employed, but is liable to be employed, cannot acquire a foreign domicile.[1] On the other hand, a person entering into the public service of a state in which he is not domiciled, probably acquires a domicile there.[2] A person domiciled in the Queen's dominions does not change his domicile by entering the navy or army.[3]

Soldiers and sailors.

A person who is not *sui juris* cannot change his domicile of his own accord. In particular, an infant cannot do so.[4]

Persons not *sui juris*.

Questions relating to domicile must be carefully distinguished from those relating to allegiance or naturalization.[5] For instance, a British subject may be domiciled in America and naturalized in France. "Allegiance" is a faith that the subject owes to the Crown, so that the phrases "to owe allegiance to the Queen" and "to be a British subject" mean the same thing. Naturalization is where an alien becomes a British subject.[6] A person born a British subject could not formerly throw off his allegiance, but the Naturalization Act, 1870, enables him to do so where, on his birth, he became a subject of a foreign state as well as a British subject; and under the same Act a British subject who, while resident in a foreign state and under no disability, becomes naturalized there, ceases to be a British subject, but has the right to remain a British subject on making the prescribed declaration.[7]

Allegiance.

Naturalization.

Republication.

The reader is referred to the author's work on Real Property[8] for the methods of reviving a revoked will, a process which is often, though incorrectly, called "republication."

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v. *Smith*, 15 Beav. 444; *Att.-Gen.* v. *Pottinger*, 6 H. & N. 733; *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611.

[1] *Hodgson* v. *Beauchesne*, 12 Moo. P. C. 285.

[2] *Ommaney* v. *Bingham*, cited in *Somerville* v. *Somerville*, 5 Ves. 757; 5 R. R. 155.

[3] *Brown* v. *Smith*, 15 Beav. 444; *Ex p. Cunningham*, 13 Q. B. D. 418; *Re Macreight*, 30 Ch. D. 165.

[4] *Urquhart* v. *Butterfield*, 37 Ch. D. 357; *Somerville* v. *Somerville*, 5 Ves. 787; 5 R. R. 155.

[5] *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441; *Haldane* v. *Eckford*, 8 Eq. 631; *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 431.

[6] Naturalization Act, 1870 (33 & 34 Vict. c. 14).

[7] *Ib.* ss. 4, 6. See, as to British subjects, *post*, p. 399.

[8] M. L. R. P. 402, 405.

CHAPTER XXI.

PERSONS UNDER DISABILITY.

Married Women—Infants—Lunatics—Aliens.

Married Women.[1]

Chap. XXI.

Common Law —Equity— Statutes.

THE position of a married woman in respect of personal property is to be considered (1st), as it was defined by the common law; (2ndly), in respect of the rights given to her in equity by means of trusts of property to be held for her separate use; and (3rdly), in respect of the proprietary rights conferred by modern statutes, viz., The Married Women's Property Acts, 1870,[2] 1882,[3] and 1893.[4]

The common law—chattels in possession.

(1.) At common law the marriage is an absolute and unqualified gift to the husband of all chattels personal of the wife in possession in her own right, whether belonging to her at the time of the marriage or acquired subsequently during the coverture, and whether he survives her or not. The property is divested out of the wife and vested in the husband only: he may dispose of it in his lifetime or by his will, and it passes to his executors or administrators as part of his personal estate.[5] The effect of marriage on the wife's chattels personal in possession was a consequence of the doctrine that, for most purposes, "husband and wife are but one person in law."[6]

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[1] See, as to real estate, M. L. R. P. 121 *et seq.* It is not practicable within the limits of this work to give more than an outline of the proprietary rights of married women in personal property; for further information on the subject the reader is referred to the text books specially dealing with it, which must also be consulted as to the contractual obligations of married women, and other matters outside the scope of this treatise. As to the history of the law of England with respect to married women's property, see the essay by Mr. C. S. Kenny; and Haynes, Outlines of Equity (Lecture VII.).

[2] 33 & 34 Vict. c. 93.

[3] 45 & 46 Vict. c. 75.

[4] 56 & 57 Vict. c. 63.

[5] Co. Litt. 351 b; *Purdew* v. *Jackson*, 1 Russ. 59, 65.

[6] Litt. s. 291. See Kenny on Married Women, pp. 7 *et seq.*; *Phillips* v. *Barnet*, 1 Q. B. D. 440, *per* Lush, J.

Paraphernalia.

The only exception to the rule appears to be in the case of "paraphernalia" of the wife, that is, apparel and ornaments suitable to the wife's condition in life, and given to her by her husband for her use as his wife, as ornaments of her person only. Of these the husband cannot dispose by will, but he can dispose of them in his lifetime by sale or gift. The wife cannot dispose of them during her husband's lifetime, but if she survives him they belong to her, subject, however, to his debts, if his other assets are insufficient.[1]

It has been held that the Married Women's Property Acts have not affected the law as to gifts of paraphernalia.[2] Gifts by strangers to the wife, or gifts by the husband not as paraphernalia, are the separate property of the wife.[3]

Choses in action.

A chose in action,[4] being a right of action to recover something which is not in possession, may be either an immediate right of action to obtain possession of the property or a future right of action to obtain such possession at a future time, in which case it is commonly called a "reversionary chose in action." Thus, a debt to recover which there is a present right of action, or a legacy immediately payable, is to be distinguished from a right to recover or obtain property after the death of a living person, as where a fund is held by trustees upon trust to pay the income to A. during his life, and after his death to transfer the fund to B.; here B. has during A.'s life a reversionary chose in action.

"The nature and extent of the husband's interest in and power over the wife's choses in action is," it has been said,[5] "of a peculiar nature. Marriage, the law says, is only a qualified gift to the husband of the wife's choses in action, viz., upon condition that he reduce them into possession during its continuance. If he happen to die before his wife without having reduced such property into possession, she, and not his personal representatives, will be entitled to it. The wife's right is not divested by the marriage. The chose in action continues to belong to her, unless the husband can and does reduce it into possession and thereby makes it cease to be a chose in action. The husband

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[1] See *Graham* v. *Londonderry*, 3 Atk. 393; *Tasker* v. *Tasker*, [1895] P. 1; and cases cited in notes to *Hulme* v. *Tenant*, in 1 W. & T. L. C. 727.

[2] *Tasker* v. *Tasker*, *sup.*

[3] *Tasker* v. *Tasker*, *sup.*; *Ex p. Pannell*, 37 W. R. 464.

[4] As to choses in action, see *ante*, Ch. IX. p. 122.

[5] *Per* Ld. Gifford, M.R., *Purdew* v. *Jackson*, 1 Russ. 66; 25 R. R. 5.

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has not on the marriage any immediate property in the chose in action; he has only the right to reduce it into possession if it be in a state capable of being so reduced. Reduction into possession is a necessary and indispensable preliminary to the husband's having any right of property in himself or to his being able to convey any right of property to another. If he dies without having been able or willing to perform this condition, the right of the wife continues unaltered exactly as if she had never married. Her title is the same after her husband's death as it was before her marriage. The husband had a power, but he had never exercised it; or the chose in action was so circumstanced" [as, for instance, where it is reversionary] "that he could not exercise it so as to fulfil the condition upon which his title depended."[1]

What is "reduction into possession."

No general rule can be laid down as to what amounts to reduction into possession.[2] Some act must be done which will have the effect of changing the property in the chose in action, or giving the husband control over the chose without the necessity of an action,[3] or enabling the husband to sue for it as had and received to his use.[4] The husband must, for some moment of time, have obtained absolute dominion over the property.[5]

The actual receipt by the husband of money due to his wife is a reduction into possession;[6] so a transfer of her stock into his sole name; or if he issue execution on a judgment obtained by him for money due to her; or if an agent appointed by husband and wife receives money forming part of an estate of which the wife is administratrix.[7] But mere receipt of interest on a debt has been held not to be a reduction into possession.[8] The receipt by the husband must be as husband, and not merely as a trustee or executor.[9]

Death of wife.

We have seen that, if the husband dies in his wife's lifetime, without having reduced the chose in action into possession, it belongs to the wife by survivorship. On the other hand, if the wife dies in her husband's lifetime, he is entitled to her choses in

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[1] See *Fleet* v. *Perrins*, L. R. 3 Q. B. 536; 4 *id.* 500.

[2] See notes to *Hornsby* v. *Lee*, in 1 W. & T. L. C. 156.

[3] *Per* Fry, J., *Re Barber*, 11 Ch. D. 442. And see 2 Spence, Eq. Jur. p. 478.

[4] *Aitchison* v. *Dixon*, 10 Eq. 589.

[5] *Nicholson* v. *Drury*, 7 Ch. D. 55, *per* Fry, J. See *Parker* v. *Lechmere*, 12 Ch. D. 256.

[6] See *Rees* v. *Keith*, 11 Sim. 388.

[7] *Re Barber*, 11 Ch. D. 442.

[8] *Hart* v. *Stevens*, 6 Q. B. 937.

[9] *Baker* v. *Hall*, 12 Ves. 497; *Wall* v. *Tomlinson*, 16 Ves. 413; 10 R. R. 212.

action not reduced into possession upon taking out letters of administration to her;[1] and if he dies without having taken out administration to her, his beneficial interest passes to his personal representatives.[2]

Reversionary chose in action.

So long as a chose in action is reversionary there can of course be no reduction into possession by the husband. An assignment of it by him would not operate as a reduction into possession,[3] and would not defeat the wife's right by survivorship, which is a legal right against which the equitable right, if it existed, of the assignee could not prevail.[4] The assignment by the husband could not pass more than his right to reduce the chose into possession if he should be able to do so, *i.e.*, if it should fall into possession before his death. If the husband died while the chose in action was still reversionary, the assignee could take nothing, for all he obtained by the assignment was the qualified and contingent right of his assignor.[5]

If the wife died while the chose in action was still reversionary the husband would as her administrator take it subject to any previous assignment made by him, and therefore it would belong to the assignee, subject, however, to payment of the wife's debts.[6]

Wife's "equity to a settlement."

In cases where the wife's chose in action is *equitable*, and not legal, she is entitled to her "equity to a settlement," that is, she can obtain an order from a Court of equity that the whole or part of the property shall be settled upon her and her children, instead of being taken by her husband or his assignees.[7] Such an order can be obtained either in an action brought by the husband to recover the property in a Court of equity, or in an action brought by the wife for the purpose of enforcing her equity.[7] This right can be asserted against any assignee of the husband.[8] There is no fixed rule, but generally one-half, though sometimes the whole, is directed to be settled.[9]

Malins' Act.

Under the old law, as a married woman had no power of

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[1] *Ante*, p. 366.

[2] See *Re Harding*, L. R. 2 P. & D. 394; *Smart* v. *Tranter*, 43 Ch. D. 587; *Re Atkinson*, [1898] 1 Ch. 637.

[3] *Purdew* v. *Jackson*, 1 Russ. 54; 25 R. R. 5.

[4] *Ib.* 57.

[5] See, for example, *Purdew* v. *Jackson*, 1 Russ. 1; 1 R. R. 1.

[6] *Heard* v. *Stanford*, Cases *temp.* Talbot, 173.

[7] See *Wallace* v. *Auldjo*, 2 Dr. & Sm. 216; 1 De G. J. & S. 643; *Elibank* v. *Montolieu*, 1 W. & T. L. C. 630, and notes thereto; Vaizey on Settlements, 271.

[8] *Macaulay* v. *Philips*, 4 Ves. 19; *Roberts* v. *Cooper*, [1891] 2 Ch. 335.

[9] *Re Suggitt*, 3 Ch. 215; *Roberts* v. *Cooper*, *sup.*

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disposing of property other than property belonging to her for her separate use, and the husband's right to her reversionary choses in action was of the qualified and contingent character above described, it was not possible, even for husband and wife together, to make an absolutely effectual disposition of such choses in action; but by an Act passed in 1857, and commonly called "Malins' Act,"[1] it was provided that every married woman may, with the concurrence of her husband, by deed acknowledged in the manner required by the Fines and Recoveries Act,[2] dispose of her future or reversionary interest, vested or contingent, in any personal estate to which she is entitled under any instrument made[3] after 31st Dec., 1857, except her own marriage settlement, as fully and effectually as if she were a *feme sole*; and may in like manner release or extinguish any power in regard to such personal estate, and release or extinguish her equity to a settlement out of her personal property in possession under any such instrument as aforesaid; but the Act is not to extend to any reversionary interest as to which she is by the instrument creating it restrained from alienation.

The title of the married woman must be derived under an "instrument," and the Act does not apply to property derived under an intestacy.[4] "Future interests" mean interests to which the married woman has, at the date of the disposition, some existing title at law or equity, and do not include mere possibilities or expectancies.[5] The Act includes legal choses in action.[6]

The concurrence of the husband, and the separate examination, are not necessary in respect of property to which the Married Women's Property Act, 1882, applies.[7]

Chattels real.

It is not strictly within the scope of the present treatise to deal with chattel interests in land; but it may be convenient here to note that, at common law,[8] legal terms of years belonging to the wife, become, on the marriage, the property of the husband *sub modo* and not absolutely. He becomes possessed of them in her right,[8] and entitled to the rents and profits of them during the

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[1] 20 & 21 Vict. c. 57. See notes to *Hornsby* v. *Lee*, 1 W. & T. L. C. 167.

[2] 3 & 4 Will. 4, c. 74.

[3] *Roberts* v. *Cooper*, [1891] 2 Ch. 335; *Re Elcom*, [1894] 1 Ch. 303.

[4] *Allcard* v. *Walker*, [1896] 2 Ch. 369.

[5] *Ib.* p. 380.

[6] *Witherby* v. *Rackham*, 60 L. J. Ch. 511.

[7] See *Riddell* v. *Errington*, 26 Ch. D. 220; *Re Harris*, 28 Ch. D. 171; *Re Batt's Settled Estates*, [1897] 2 Ch. 65.

[8] Co. Litt. 300 a.

coverture. The marriage does not divest the term out of the wife, but the husband may dispose of it *inter vivos*, though not by his will,[1] and if he survives his wife he is entitled to it absolutely *jure mariti*, without taking out administration to her;[2] but if the wife survives the husband, she is entitled to it, subject to any disposition made by the husband *inter vivos*. The husband's rights extend to reversionary interests of the wife in leaseholds for years,[3] unless they are of such a nature that they could not possibly vest in possession until after the husband's death.[4]

Equitable separate estate.

(2.) Equitable separate estate of a married woman must be distinguished from separate estate which is made such under statutory provisions.[5]

In equity a married woman has ever since the reign of Elizabeth[6] been considered as capable of possessing property to her separate use, independently of her husband; such property is called her separate estate, and, in respect of it, she is considered as a *feme sole*. It may be acquired either by contract with the husband before marriage, or by gift from him, or from any stranger, wholly independent of such contract; so far as his legal rights as husband may interfere, the Court will treat him as a trustee for the wife.[7]

The legal estate in the wife's separate property being vested in a trustee or trustees, she cannot convey any legal interest in it; but so far as her equitable beneficial interest is concerned, she has the same power of disposition, whether *inter vivos* or by will, as if she were unmarried.[8] The separate use operates as a protection to a married woman against the legal power over the wife's property which is vested in the husband. "It acts in contravention and control of the legal right of the husband, and as against his legal power it is a sufficient protection; but, the power of alienation remaining in the wife, the separate estate, unfettered, is no protec-

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[1] *Bracebridge* v. *Cook*, Plowd. 418.

[2] *Re Bellamy*, 25 Ch. D. 620; *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

[3] *Re Bellamy*, *ubi sup.*

[4] *Duberley* v. *Day*, 16 Beav. 33.

[5] *Post*, p. 392.

[6] *Sanky* v. *Golding*, Cary, 124. See the early cases cited in Kenny on Married Women, pp. 99 *et seq.*, and in Haynes, Outlines of Equity (Lecture VII.). As to separate property generally, see Vaizey on Settlements, Ch. X., pp. 747 *et seq.*

[7] *Per* Ld. Langdale, M.R., *Tullett* v. *Armstrong*, 1 Beav. 21. As to the husband being a trustee, see *per* James, L.J., *Ashworth* v. *Outram*, 5 Ch. D. 941; *Ex p. Sibeth*, 14 Q. B. D. 417; *Wassell* v. *Leggatt*, [1896] 1 Ch. 554. As to gifts by husband to wife, see Vaizey on Settlements, 760, and *ante*, p. 89.

[8] *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; 1 R. R. 79.

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tion against the moral influence of the husband; and many instances have occurred in which the wife, under the persuasion or influence of her husband, has been induced to exercise her power of alienation in his favour, or for his benefit, and thus defeat the protection intended for her.[1] It has, therefore, become usual to introduce into wills and settlements a clause directing that the separate estate shall be incapable of assignment in anticipation, or of alienation; and the validity of this restraint on anticipation" has long been allowed.[2] But a restraint on anticipation can only be imposed in respect of separate estate;[3] though it is sufficient if the separate use arises only by virtue of the Act.[4]

Restraint on anticipation.

Separate estate, as its name implies, has its existence only during a coverture, *i.e.*, so long as the owner of it is a married woman;[5] but, unless the trust for separate use is limited to the duration of a specified marriage,[6] the separate use will again arise on a subsequent marriage;[7] and the restraint on anticipation, being only an incident of the separate estate, ceases with the determination of the coverture but attaches again on a subsequent marriage.[7] Therefore, after the death of the husband or dissolution of the marriage, the wife (so long as she remains unmarried) can dispose of property which during the marriage was her equitable separate property subject to a restraint on anticipation.[8]

The restraint on anticipation does not apply to income which has accrued due to a married woman, though such income has not come to her hands, but is in the hands of her trustees.[9]

A married woman cannot by any estoppel from her acts, conduct,

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[1] *Per* Ld. Langdale, M.R., *Tullett* v. *Armstrong*, 1 Beav. 22. As to gifts by wife to husband, see Vaizey on Settlements, 783 *et seq.*

[2] *Ib.* See, further, as to separate estate, *per* Ld. Selborne, C., *Cahill* v. *Cahill*, 8 App. Cas. 426 (cited M. L. R. P. 115); *Taylor* v. *Meads*, 4 De G. J. & S. 597, 603 (cited M. L. R. P. 117); and as to restraint on anticipation, M. L. R. P. 128; Elph. N. & C. Interp. 301; Theobald on Wills, 514; *Butler* v. *Butler*, 16 Q. B. D. 377. As to the history of the "restraint on anticipation," see Haynes, Outlines of Equity (Lecture VII.), p. 227; Kenny on Married Women, 104.

[3] *Stogdon* v. *Lee*, [1891] 1 Q. B. 661.

[4] *Re Lumley*, [1896] 2 Ch. 690.

[5] *Tullett* v. *Armstrong*, 1 Beav. 24.

[6] *Ib.* p. 27; *Hawkes* v. *Hubback*, 11 Eq. 5; *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396; *Stroud* v. *Edwards*, 77 L. T. 280.

[7] *Tullett* v. *Armstrong*, 1 Beav. 1; 4 My. & Cr. 390; *Shafto* v. *Butler*, 40 L. J. Ch. 308; *Hamilton* v. *Hamilton*, *sup.*; *Stroud* v. *Edwards*, *sup.* See *Woodmeston* v. *Walker*, 2 R. & My. 197.

[8] *Wright* v. *Wright*, 2 J. & H. 647.

[9] *Hood-Barrs* v. *Heriot*, [1896] A. C. 174.

or admissions, or by her own fraud, be deprived of the protection afforded by a restraint on anticipation.[1]

Removal of restraint in certain cases.

The Conveyancing Act, 1881, provides that, where a married woman is restrained from anticipation, the Court may, with her consent, by judgment or order bind her interest in any property if it appears to the Court to be for her benefit to do so.[2] The Married Women's Property Act, 1893, enables the Court, before which any action or proceeding instituted by a woman is pending, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and to enforce such order by the appointment of a receiver and the sale of the property.[3]

Devolution of separate estate.

The quality of separate property ceases on the death of the married woman, and thereupon, in the absence of express provision to the contrary, her separate property (so far as she has not disposed of it by will or otherwise) devolves, and the right of her husband surviving her accrues, just as if the separate use had never existed.[4]

Separate use—how created.

No particular form of words is required to create the separate use. Any expression from which an intention to exclude the husband can be clearly inferred will be sufficient for that purpose; but the intention to give a separate estate must be clearly expressed.[5] The words must show an intention to secure the property against the control of the husband and to give to the wife the sole and absolute disposition.[6]

The usual origin of separate estate is an ante-nuptial settlement, or a gift or limitation to her separate use in some other written instrument *inter vivos*, or a bequest by will; but such separate estate may arise in other ways, as, for example, where her husband agrees after the marriage that she shall carry on a trade or business on her separate account; and such agreement may be express, or implied from conduct on the part of the husband showing that he

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[1] *Bateman* v. *Faber*, [1898] 1 Ch. 144.

[2] 44 & 45 Vict. c. 41, s. 39. *Re Pollard*, [1896] 2 Ch. 552.

[3] 56 & 57 Vict. c. 63, s. 2. *Hood-Barrs* v. *Heriot*, [1897] A. C. 177; *Hood-Barrs* v. *Cathcart* (No. 4), [1895] 1 Q. B. 873.

[4] *Per* Stirling, J., *Re Lambert*, 39 Ch. D. 633; citing *Proudley* v. *Fielder*, 2 My. & K. 57; *Molony* v. *Kennedy*, 10 Sim. 254; *Cooper* v. *Macdonald*, 7 Ch. D. 296. See *ante*, p. 366.

[5] See Elph. N. & C. Interp. Rule 117, p. 296, and instances there cited; and in the notes to *Hulme* v. *Tenant*, 1 W. & T. L. C. 661; Theobald on Wills, 512; Vaizey on Settlements, p. 754.

[6] *Massy* v. *Rowen*, L. R. 4 H. L. 288. See *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

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had made himself a trustee for the wife.[1] And separate property might arise where a wife was deserted by her husband,[2] or judicially separated.[3]

Lord Langdale, M.R.,[4] expressed the result of the authorities in the following propositions:—

"Property given to a woman for her separate use, independent of any husband, may be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert. In respect of such separate estate she is considered as a *feme sole*, although covert. Her faculties as such and the nature and extent of them are to be collected from the terms in which the gift is made to her and will be supported by the Court for her protection."

"The words 'independent of a husband,' whether expressed, or implied in the terms of the gift, mean no more than that the Court will not permit the marital power of the husband to be used in contravention of the enjoyment of the property according to the terms of the gift."

"If the gift be made for her sole and separate use, without more, she has during the coverture an alienable estate independent of her husband."

"If the gift be made for her sole and separate use without power to alienate, she has during the coverture the present enjoyment of an unalienable estate, independent of her husband."

"In either of these cases she has, when discovert, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; while the woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising on the happening of a marriage. The separate estate may and often does exist without the restriction, but the restriction has no independent existence; when found, it is as a modification of the separate estate and inseparable from it."

Statutory separate property—Married Women's Property Act, 1870.

(3.) Thirdly, we have to discuss the proprietary rights conferred on married women by statute.

The Married Women's Property Act, 1870,[5] as amended by the Act of 1874,[6] gave to every married woman (whenever married) as

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[1] See the cases of *Ashworth* v. *Outram*, 5 Ch. D. 923; *Lovell* v. *Newton*, 4 C. P. D. 7; and *Re Dearmer*, 53 L. T. 905.

[2] *Cecil* v. *Juxon*, 1 Atk. 278.

[3] *Rudge* v. *Weedon*, 4 De G. & J. 216. See as to a protection order on desertion, 20 & 21 Vict. c. 85, s. 21, amended by 21 & 22 Vict. c. 108, s. 8; *Mahoney* v. *M'Carthy*, [1892] P. 21; *Hill* v. *Cooper*, [1893] 2 Q. B. 85; *Re Hughes*, [1898] 1 Ch. 529; as to judicial separation, 20 & 21 Vict. c. 85, ss. 25, 26, on which see *Waite* v. *Morland*, 38 Ch. D. 135; *Hill* v. *Cooper*, *sup.*

[4] *Tullett* v. *Armstrong*, 1 Beav. 32.

[5] 33 & 34 Vict. c. 93.

[6] 37 & 38 Vict. c. 50.

her separate property, when acquired after the 9th August, 1870, all separate earnings,[1] deposits in savings banks made in her own name, and all government annuities, public stocks or funds, shares, debentures, or stock of any company or society entered in her own name; also (in cases of women married after 1870) all personal property devolving on her as next of kin of an intestate, and any sum not exceeding 200*l.* coming to her under any deed or will,[2] and the rents and profits of real estate descending to her as heiress. The Act also enabled a married woman to insure her own or her husband's life, for her separate use.[3]

Married Women's Property Act, 1882.

The Acts of 1870 and 1874 were repealed by the Married Women's Property Act, 1882,[4] which made very sweeping changes in the proprietary relations of husband and wife, and to a very large extent abrogated the old common law rules; but "any act done or right acquired" while either of those Acts were in force was not to be affected by the repeal.[4] It is to be especially observed that separate property to which a married woman is entitled under this Act is her property at law, and the legal interest is vested in her and not in trustees in trust for her, as is the case with the equitable separate estate which we discussed above. The provisions of the Act, it has been said, "seem to be intended to give her at law a right to any property acquired after the commencement of the Act (Jan. 1st, 1883), equivalent to the separate use, which was a creation of equity. In the creation of that separate use a trust was required; and, as a trust never fails for want of a trustee, where no other trustee was appointed, it was held that the husband should be considered as trustee for the wife. This new interest is to be without any trust, a legal interest."[5]

It will be seen that the Act gives proprietary rights, not only to all women married after 1882, but also to women married before 1883, so far as regards property acquired by them after 1882.

Capacity to acquire, hold, and dispose of separate property.

By the Act of 1882,[6] as amended by the Act of 1893,[7] a married woman is, in accordance with the provisions of the Act,[8] capable of acquiring, holding, and disposing of, by will or otherwise, any real or

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[1] See *Ashworth* v. *Outram*, 5 Ch. D. 923.

[2] *Re Voss*, 13 Ch. D. 504; *Re Davies*, [1897] 2 Ch. 204.

[3] *Johnson* v. *Johnson*, 35 Ch. D. 345.

[4] 45 & 46 Vict. c. 75, s. 22.

[5] *Per* Kay, J., *Re Jupp*, 39 Ch. D. 152.

[6] 45 & 46 Vict. c. 75.

[7] 56 & 57 Vict. c. 63.

[8] See *Re Cuno*, 43 Ch. D. 12.

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personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee.[1]

Women married *after* 1882.

A woman married *after* the commencement of the Act is entitled to have, hold and dispose of as her separate property, all real and personal property belonging to her at the time of marriage, or acquired by or devolving on her after marriage, including all earnings, money, and property gained or acquired by her in a separate trade or occupation.[2]

Women married *before* 1883.

A woman married *before* the commencement of the Act is entitled to have, hold, and dispose of as her separate property all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues *after* the commencement of the Act, including all earnings, money, and property gained or acquired by her separately from her husband.[3]

It was held that sect. 1 did not give any disposing power as to property not falling within sects. 2 and 5, and that, therefore, the will of a married woman would not operate on property acquired by her before the Act or after coverture unless re-published;[4] but this has been altered by the Act of 1893.[5]

Accrual of title.

If a woman married before the commencement of the Act has, before that time, acquired a title, whether vested or contingent, in reversion or remainder, to any property, such property does not become her separate property by sect. 5, though it falls into possession after the Act.[6]

Settlements, or restraint on anticipation, not affected.

The provisions of sects. 2 and 5 of the Act of 1882 must be read in connection with those of sect. 19, which provide that nothing in the Act shall interfere with or affect any settlement, whether antenuptial or post-nuptial, respecting the property of a married woman, or any restraint on anticipation.[7] A restraint on anticipation in any settlement by a woman of her own property is not, however, valid against any debts contracted by her before marriage, and a settlement has no greater validity against the creditors of such woman than a like settlement by a man would have.[7]

Therefore, in the case of property belonging to or coming to a married woman which would be bound by the terms of a settle-

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[1] Act of 1882, s. 1 (1).
[2] *Ib.* s. 2.
[3] *Ib.* s. 5.
[4] *Re Cuno*, 43 Ch. D. 12; *Re Price*, 28 Ch. D. 709.
[5] 56 & 57 Vict. c. 63, s. 3. *Ante*, p. 365.
[6] *Reid* v. *Reid*, 31 Ch. D. 402; *Re Parsons*, 45 Ch. D. 51.
[7] 45 & 46 Vict. c. 75, s. 19.

ment, she is not by the Act enabled to dispose of such property without regard to such settlement.[1]

Investments.

All deposits in savings banks, or other banks, annuities, public stocks or funds, stocks, shares, or debentures of or in any corporation, company, or society standing in the name of a married woman at the commencement of the Act[2] (1st Jan., 1883), or afterwards placed in her sole name,[3] are deemed to be her separate property until the contrary is shown. As to such property afterwards placed in her name, her separate estate is alone liable in respect of any liability incident to such property.[3]

Where any of the above property is invested in the names of a married woman jointly with a person other than her husband, the provisions of sects. 6 and 7 apply thereto so far as relates to "the estate, right, title, or interest" of the married woman.[4]

A married woman can deal with any such property standing in her sole name or in her name jointly with a person other than her husband without the concurrence of her husband.[5]

If a married woman makes any such investment out of moneys of her husband without his consent, he can recover such investment.[6]

A married woman may effect a policy of insurance upon her own or her husband's life for her separate use.[7]

Remedies of married woman for protection of separate property.

Every woman, whether married before or after the Act, is to have in her own name against all persons, including her husband, the same civil remedies, and also (subject, as regards her husband, to certain restrictions where they are living together, and in respect of acts done by him while they were living together) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*.[8]

The Act of 1882 does not affect the devolution of a wife's separate estate on her death so far as she has not exercised her power of disposing of it by will, and as to such undisposed-of property the rights of her husband remain.[9]

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[1] *Re Whitaker*, 34 Ch. D. 227; *Hancock* v. *Hancock*, 38 Ch. D. 78; *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307.

[2] 45 & 46 Vict. c. 75, s. 6.

[3] *Ib.* s. 7.

[4] *Ib.* s. 8.

[5] *Ib.* s. 9.

[6] *Ib.* s. 10.

[7] *Ib.* s. 11. See also *ante*, p. 139.

[8] *Ib.* s. 12.

[9] See *Re Lambert*, 39 Ch. D. 626, *ante*, p. 391; and as to the operation of the will of a married woman, *ante*, p. 365.

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Gift to husband and wife and third person.

It was a consequence of the doctrine that husband and wife are (for most purposes) one person in law[1] that, if property were conveyed or bequeathed to a husband and his wife and third persons, the husband and wife took only one share between them; for instance, where a legacy was given to A., his wife and children, and there were two children, each child took one-third, and A. and his wife one-third between them.[2] But any indication, however slight, of an intention that the husband and wife should take separately has been held to defeat the application of the doctrine.[3] The interest taken by a husband and wife is called a "tenancy by entireties."[4]

The Act of 1882 does not alter any rights except those of the husband and wife *inter se*, and therefore does not alter the above rule so far as regards the rights of the third persons; the husband and wife still take one share between them, but the wife takes one-half of that share as her separate property according to the Act.[5]

Infants.

Coke says[6] that an infant cannot bind himself by any deed, or alien any land, goods, or chattels. The true doctrine seems to be that any instrument executed or act done by an infant which is necessarily prejudicial to him is void as against him; but that, if it may be for his benefit, it is voidable only, and stands good unless he elects within a reasonable time after coming of age to avoid it;[7] and this is so, although the infant who has come of age is a married woman.[8]

Necessaries.

Contract of service.

There are some exceptions to the above rule, for an infant is bound to pay for necessaries supplied to him,[9] and is bound by the terms of a contract of apprenticeship or service entered into by him,[10] unless it is an unfair contract which is not to his advantage.[10]

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[1] *Ante*, p. 384.

[2] *Gordon* v. *Whieldon*, 11 Beav. 170.

[3] *Dias* v. *De Livera*, 5 App. Cas. 136. See *Re Dixon*, 42 Ch. D. 306.

[4] See M. L. R. P. 256; *Atcheson* v. *Atcheson*, 11 Beav. 485, 490; *Ward* v. *Ward*, 14 Ch. D. 506.

[5] *Re March*, 27 Ch. D. 166; *Re Jupp*, 39 Ch. D. 148.

[6] Co. Litt. 171 b.

[7] 1 Roll. Abr. 728; Co. Litt. 2 b; Shep. Touch. 232; *Zouch* v. *Parsons*, 3 Burr. 1807; *Overton* v. *Banister*, 3 Hare, 503; *Burnaby* v. *Equitable Reversionary Soc.*, 28 Ch. D. 416; *Edwards* v. *Carter*, [1893] A. C. 360; M. L. R. P. 119.

[8] *Re Hodson*, [1894] 2 Ch. 421.

[9] See *Walter* v. *Everard*, [1891] 2 Q. B. 369; *Johnstone* v. *Marks*, 19 Q. B. D. 509. Sale of Goods Act, 1893, s. 2.

[10] *De Francisco* v. *Barnum*, 45 Ch. D. 430; *Corn* v. *Matthews*, [1893] 1 Q. B.

An infant cannot make himself liable on a bill of exchange or promissory note,[1] even it is given to pay for necessaries supplied.[1]

Bill of exchange.

If, at the time of repudiation, the infant has derived no benefit from the contract, he can recover back anything he has paid or given under it, but not if he has derived any benefit.[2]

Money paid by infant.

The Infants' Relief Act, 1874, provides that all contracts, whether by specialty or simple contract, entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied, other than contracts for necessaries, and all accounts stated with infants, shall be absolutely void; but this provision does not invalidate any contract into which an infant may, by any statute or by the rules of common law or equity, enter, except such as are by law voidable.[3]

Infants' Relief Act, 1874.

The Act further provides that no action shall be brought to charge any person upon a promise made after full age to pay a debt contracted during infancy, or on any ratification made after full age of a promise or contract made during infancy, whether there is or is not any consideration for such promise or ratification.[4]

By the Infants' Settlements Act, 1855,[5] a male infant not under twenty years of age, and a female infant not under seventeen years of age, may with the approbation of the Court make a binding settlement on marriage of his or her real or personal estate, whether in possession, reversion, remainder, or expectancy.[6] It has been held[7] that the Act removes the disability of infancy only, leaving unaffected the disability of coverture; and therefore a settlement by an infant married woman made after the marriage with the approval of the Court was ineffectual as to a reversionary chose in action (not within Malins' Act).[8]

Infants' Settlements Act.

The Act gives no jurisdiction to the Court to compel an infant to make a settlement.[9]

310; *Evans* v. *Ware*, [1892] 3 Ch. 502; *Clements* v. *L. & N. W. R. Co.*, [1894] 2 Q. B. 482; *Walter* v. *Everard*, *sup.*

[1] *Re Soltykoff*, [1891] 1 Q. B. 413.

[2] *Hamilton* v. *Vaughan-Sherrin Co.*, [1894] 3 Ch. 589; *Valentini* v. *Canali*, 24 Q. B. D. 166.

[3] 37 & 38 Vict. c. 62, s. 1. See *Valentini* v. *Canali*, 24 Q. B. D. 166.

[4] *Ib.* s. 2. See *Ditcham* v. *Worrall*, 5 C. P. D. 410; *Smith* v. *King*, [1892] 2 Q. B. 543.

[5] 18 & 19 Vict. c. 43.

[6] See the form in 2 K. & E. 540. Property "in expectancy" includes after-acquired property; *Moore* v. *Johnson*, [1891] 3 Ch. 48.

[7] *Seaton* v. *Seaton*, 13 App. Cas. 61. The question whether the Act applies to a post-nuptial settlement was not decided; *Ib.* p. 68. See *Re Sampson*, 25 Ch. D. 482.

[8] *Ante*, p. 387.

[9] *Re Leigh*, 40 Ch. D. 290.

Persons of unsound mind.

Voluntary conveyances, &c.

Acts of a lunatic or person of unsound mind which are merely voluntary, *i.e.*, where there has been a dealing by the lunatic with his own property without any consideration passing from others, are void.[1] But transactions for value are not void, but voidable only; and they are not even voidable where the lunatic's state of mind was unknown to the other party and no advantage was taken of the lunatic.[2] "The result of the authorities," said Lord Cranworth,[3] "seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding."

"When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."[4]

By the Lunacy Acts, 1890 and 1891,[5] replacing former enactments, provision is made for the management of the property of persons of unsound mind by means of "committees," and under the superintendence of the judge in lunacy.[6]

Aliens.[7]

A friendly alien is under no incapacity by common law as to contracting or as to chattels personal;[8] but by statute[9] he is disqualified from being the owner of a British ship.

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[1] *Elliot* v. *Ince*, 7 De G. M. & G. 475, 487.

[2] *Molton* v. *Camroux*, 2 Ex. 487; 4 Ex. 17; *Matthews* v. *Baxter*, L. R. 8 Ex. 132.

[3] *Elliot* v. *Ince*, 7 De G. M. & G. 488.

[4] *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, 601, *per* Ld. Esher, M.R.

[5] 53 Vict. c. 5; 54 & 55 Vict. c. 65. See Pope's Law and Practice in Lunacy.

[6] *Ib.* s. 108; M. L. R. P. 120.

[7] See Foote on Private International Jurisprudence, 2nd ed., pp. 13 *et seq.*

[8] Co. Litt. 129 b; *Watford* v. *Masham*, Moo. 431. As to the power of a friendly alien to acquire chattels real, see M. L. R. P. 108.

[9] The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1; The Naturalization Act, 1870 (33 Vict. c. 14), s. 14. *Ante*, p. 107.

By the Naturalization Act, 1870,[1] "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject."

An alien enemy[2] has no remedy on his contracts during the continuance of the war; but when peace is restored he can sue in our courts.[3] If, however, he has licence from the Crown to trade, he can sue during the continuance of the war.[4] A British subject, or the subject of a neutral state, trading in,[5] or permanently[6] residing in an enemy's country, is under the disability of an alien enemy, and the Crown cannot enable him to sue.[7]

"Natural-born British subjects" include:—

(1) At common law. A child born within the legiance of the Queen,[8] or, in other words, within the British dominions, not being a child whose father is an alien enemy and who is born in a place in hostile occupation; or a child born to an English ambassador in the country to which he is accredited;[9] but not a child born in foreign parts to an officer in the military service of the Crown there.[10]

(2) By statute. A child born out of the British dominions whose father or father's father was born within the British dominions,[11] unless the father was at the time of the birth in the actual service of a foreign enemy.[12]

Naturalization Act, 1870.

A married woman is a subject of the State of which her husband is for the time being a subject;[13] but a widow, if she is a natural-born British subject and has become an alien, may obtain a certificate of re-admission to British nationality.[14] Where the father, or the mother (being a widow), being a British subject becomes an alien,

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[1] 33 Vict. c. 14, s. 2.

[2] The Court will take judicial notice of the existence of a war; *Alcinous* v. *Nigreu*, 4 E. & B. 217.

[3] *Alcinous* v. *Nigreu*, *sup.*; *Flindt* v. *Waters*, 15 East, 260; 13 R. R. 457; *Brandon* v. *Nesbitt*, 6 T. R. 23; 3 R. R. 109.

[4] *Wells* v. *Williams*, 1 Ld. Raym. 282; *Usparicha* v. *Noble*, 13 East, 332; 12 R. R. 360.

[5] *Albretcht* v. *Sussmann*, 2 V. & B. 322; 13 R. R. 110.

[6] *Roberts* v. *Hardy*, 3 M. & S. 533; 16 R. R. 347.

[7] *M'Connell* v. *Hector*, 3 Bos. & P. 113; 6 R. R. 724.

[8] 1 Co. Litt. 129 a. See *ante*, p. 383.

[9] *Aeneas Macdonald's Case*, 18 State Trials, 857; *Calvin's Case*, 7 Rep. 18 a; *Bacon* v. *Bacon*, Cro. Car. 601.

[10] *De Geer* v. *Stone*, 22 Ch. D. 243.

[11] *De Geer* v. *Stone*, *sup.*; *Re Willoughby*, 30 Ch. D. 324.

[12] 7 Anne, c. 5, s. 3; 4 Geo. 2, c. 21; 13 Geo. 3, c. 21.

[13] Naturalization Act, 1870 (33 Vict. c. 14), s. 10 (1).

[14] *Ib.* s. 10 (2).

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the children who during infancy have become resident in the country where the parent is naturalized and have become naturalized there are not British subjects.[1] If, however, the father or mother (being a widow) under such circumstances obtains a certificate of re-admission to British nationality, the children who during infancy have become resident with such father or mother in the British dominions become British subjects.[2] Where the father or mother (being a widow) have been naturalized in the United Kingdom, the children who during infancy have become resident with such father or mother in the United Kingdom, or with such father in the service of the Crown out of the United Kingdom, become naturalized British subjects.[3]

Denization.

Naturalization.

Letters of denization granted by the Crown to an alien make him a British subject as from their date. Naturalization, whereby an alien becomes a British subject, is obtained either by a special Act of Parliament or by a certificate under the Naturalization Act, 1870.[4]

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[1] Naturalization Act, 1870 (33 Vict. c. 14), s. 10 (3).

[2] *Ib.* s. 10 (4).

[3] *Ib.* s. 10 (5), as amended by s. 1 of the Naturalization Act, 1895 (58 & 59 Vict. c. 43).

[4] 33 Vict. c. 14, as amended by 33 & 34 Vict. c. 102; 35 & 36 Vict. c. 39; and 58 & 59 Vict. c. 43.

ACTS IN APPENDIX.

THE WILLS ACT, 1837.
[7 Will. 4 & 1 Vict. c. 26.]

THE WILLS ACT, 1852.
[15 & 16 Vict. c. 24.]

THE STATUTES OF DISTRIBUTION (in part).
[22 & 23 Car. 2, c. 10.]
[1 Jac. 2, c. 17.]

FORMS IN APPENDIX.

BILL OF LADING.

CHARTERPARTY.

POLICY OF MARINE ASSURANCE.

LETTERS PATENT.

BILL OF SALE.

APPENDIX.

THE WILLS ACT, 1837[1] (3RD JULY, 1837)..

7 Will. 4 & 1 Vict. c. 26.

[7 WILL. 4 & 1 VICT. CAP. 26.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows (that is to say): the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled an Act for taking away the Court of wards and liveries, and tenures in capite and by knight's service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof, or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled an Act for taking away the Court of wards and liveries, and tenures in capite and by knight's service, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word

"Will."

12 Car. 2, c. 24.

14 & 15 Car. 2 (I.).

"Real estate."

"Personal estate."

[1] This is the title given to the Act by the Short Titles Act, 1896 (59 & 60 Vict. c. 14).

7 Will. 4 & 1 Vict. c. 26.

importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Number.
Gender.

Repeal of the statute 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5.

II. And be it further enacted, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled the Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his land; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled the Bill concerning the explanation of wills; and also an Act passed in the

10 Car. 1, sess. 2, c. 2 (I.).

Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled an Act how lands, tenements, etc., may be disposed by will or otherwise, and concerning wards and primer seisins; and

29 Car. 2, c. 3, ss. 5, 6, 12, 19 to 22.

also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled an Act for prevention of frauds and perjuries, and of an Act passed in the Parliament of Ireland in the

7 Will. 3, c. 12 (I.).

seventh year of the reign of King William the Third, intituled an Act for prevention of frauds and perjuries, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so

4 & 5 Anne, c. 16, s. 14.

much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled an Act for the amendment of the law and the better advancement of justice, and of an Act passed in the Parliament

6 Anne, c. 10 (I.).

of Ireland in the sixth year of the reign of Queen Anne, intituled an Act for the amendment of the law and the better advancement of justice, as relates to witnesses to nuncupative wills; and also so much of

14 Geo. 2, c. 20, s. 9.

an Act passed in the fourteenth year of the reign of King George the Second, intituled an Act to amend the law concerning common recoveries and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the second, intituled an Act for prevention of frauds and perjuries, as relates to estates *pur autre vie;*

25 Geo. 2, c. 6 (except as to colonies).

and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled an Act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England, and in his Majesty's colonies and plantations in America, except so far as relates to his Majesty's colonies and plantations in America; and also an Act passed in the Parliament of Ireland in the

25 Geo. 2, c. 11 (I.).

same twenty-fifth year of the reign of King George the Second, intituled an Act for the avoiding and putting an end to certain doubts

and questions relating to the attestation of wills and codicils concerning real estates; and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled an Act to remove certain difficulties in the disposition of copyhold estates by will, shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates *pur autre vie* to which this Act does not extend.[1]

7 Will. 4 & 1 Vict. c. 26.

55 Geo. 3, c. 192.

All property may be disposed of by will.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made: and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

[1] Repealed by the Statute Law Revision Act, 1874.

7 Will. 4 & 1 Vict. c. 26.

As to the fees and fines payable by devisees of customary and copyhold estates.

IV. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills of customary freeholds and copyholds to be entered on the Court Rolls; and the lord to be entitled to the same fine, &c. when such estates are not now devisable as he would have been from the heir.

V. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made or so much thereof as shall contain the disposition of such real estate, to be entered on the Court Rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the Court Rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall

as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent. 7 Will. 4 & 1 Vict. c. 26.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. Estates *pur autre vie*.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid. No will of a minor valid;

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act. nor of a *feme covert*.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.[1] Every will to be in writing, and signed in the presence of two witnesses.

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. Appointments by will to be executed like other wills, &c.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act. Soldiers' and mariners' wills excepted.

[1] Amended by the Wills Act, 1852 (15 & 16 Vict. c. 24). *Post*, p. 412.

7 Will. 4 & 1 Vict. c. 26.

Act not to affect provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers, &c.

XII. And be it further enacted, that this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled an Act to amend and consolidate the laws relating to the pay of the royal navy, respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money and allowances, or other moneys payable in respect of services in her Majesty's navy.[1]

Publication not to be requisite.

XIII. And be it further enacted, that every will executed in manner hereinbefore required, shall be valid without any other publication thereof.

Will not void by incompetency of witness.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, nothwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

Creditor attesting to be admitted a witness.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in

[1] Repealed by 28 & 29 Vict. c. 112, s. 1.

exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions). 7 Will. 4 & 1 Vict. c. 26.

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. No will to be revoked by presumption.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. In what cases wills may be revoked.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or in some part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will. No alteration in a will shall have any effect unless executed as a will.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown. How revoked will shall be revived.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. When a devise not to be rendered inoperative, &c.

7 Will. 4 & 1 Vict. c. 26.

A will to speak from the death of the testator.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

What a residuary devise shall include.

XXV. And be it further enacted, that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

What a general devise shall include.

XXVI. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

What a general gift shall include.

XXVII. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

How a devise without words of limitation shall be construed.

XXVIII. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

7 Will. 4 & 1 Vict. c. 26.

How the words "die without issue" or "die without leaving issue" shall be construed.

XXIX. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or a failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being (without any implication arising from such words) a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

No devise to trustees or executors, except, &c., shall pass a chattel interest.

XXX. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise, &c., to take the fee.

XXXI. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Devises of estate tail shall not lapse.

XXXII. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue

XXXIII. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not deter-

7 Will. 4 & 1 Vict. c. 26.

minable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

living at the testator's death shall not lapse.

To what wills and estates this Act shall not extend.

XXXIV. And be it further enacted, that this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Not to Scotland.

XXXV. And be it further enacted, that this Act shall not extend to Scotland.

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15 & 16 Vict. c. 24.

THE WILLS ACT AMENDMENT ACT, 1852.

[15 & 16 Vict. c. 24.]

1 Vict. c. 26.

I. Where by an Act passed in the first year of the reign of her Majesty Queen Victoria, intituled An Act for the Amendment of the Laws with respect to Wills, it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the

When signature to a will shall be deemed valid.

15 & 16 Vict. c. 24.

signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

Act to extend to certain wills already made.

II. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto, in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will.

Interpretation of "will."

III. The word "will" shall, in the construction of this Act, be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of her Majesty Queen Victoria.

STATUTES OF DISTRIBUTION.

22 & 23 Car. 2, c. 10.

[22 & 23 Car. 2, c. 10.]

Section 5. All ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following, that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of such children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate or shall be advanced by the intestate in his

22 & 23 Car. 2, c. 10.

lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir at law, shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate or were advanced in the lifetime of the intestate as shall make the estate of all the said children to be equal as near as can be estimated; but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate.

Section 6. And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the widow of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them.

Section 7. Provided that there be no representations admitted among collaterals after brothers' and sisters' children; and in case there be no wife, then all the said estate to be distributed equally to and amongst the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate and their legal representatives as aforesaid and in no other manner whatsoever.

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1 Jac. 2, c. 17.

[1 Jac. 2, Cap. 17.]

Section 7. Provided also and it is further enacted that if after the death of a father any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister and the representatives of them shall have an equal share with her, anything in the last mentioned Acts[1] to the contrary notwithstanding.

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[1] *I.e.*, the Statute of Distribution, 22 & 23 Car. 2, c. 10, and the Statute of Frauds, 29 Car. 2, c. 3, s. 25.

FORMS.

BILL OF LADING.[1]

SHIPPED IN GOOD ORDER AND CONDITION[2] by in and upon the good ship called the whereof is master for this present voyage and now riding at anchor in and bound for fifty casks[3] of being marked and numbered as in the margin weight[4] and contents unknown[5] and are to be delivered[6] in the like good order and condition, the act of God,[7] the Queen's enemies,[8] pirates, robbers[9] by land or sea but not pilferage,[10] restraint[11] of princes, rulers, or people, fire, jettison,

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[1] *Ante*, p. 67.

[2] These words apply to the external condition only: *Moore* v. *Harris*, 1 App. Cas. 328.

[3] The statement in a bill of lading as to the quantity of goods shipped is, unless there is a special provision to the contrary, only *primâ facie*, and not conclusive, evidence against the shipowner as to the amount shipped, and he may prove that in fact a smaller amount was shipped: *Brown* v. *Powell Co.*, L. R. 10 C. P. 562; *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128; *Lishman* v. *Christie*, 19 Q. B. D. 333; *Smith* v. *Bedouin Co.*, [1896] A. C. 70. By the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 3, every bill of lading in the hands of a consignee or indorsee for value which represents goods to have been shipped on board a vessel is conclusive evidence *against the master or other person signing it*, unless the holder of the bill of lading knew that the goods had not in fact been shipped, or unless the misstatement was caused without any default on the part of the person signing and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

[4] *Blanchet* v. *Powell's Co.*, L. R. 9 Ex. 74.

[5] As to the effect of the words "contents unknown," see *Lebau* v. *General Steam Nav. Co.*, L. R. 8 C. P. 88; *Tully* v. *Terry*, *ib.* 679.

[6] *I.e.*, according to the usage at the port of delivery: *Cargo ex Argos*, L. R. 5 P. C. 160; *Petrococchino* v. *Bott*, L. R. 9 C. P. 360.

[7] *Ante*, p. 29, n. 10.

[8] *I.e.*, any sovereign who makes war with or against whom war is made by the sovereign of the shipowner: *The Heinrich*, L. R. 3 A. & E. 424; *Russell* v. *Niemann*, 17 C. B. N. S. 163.

[9] As to the meaning of "robbers," see *Taylor* v. *Liverpool Co.*, L. R. 9 Q. B. 546; *De Rothschild* v. *Royal Mail Co.*, 7 Ex. 734.

[10] Where goods are stolen by persons in the service of the ship, the case is not within an exception of loss from "pirates, robbers, or thieves"; *Steinman* v. *Angier Line*, [1891] 1 Q. B. 619.

[11] *I.e.*, an actual (*Atkinson* v. *Ritchie*,

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barratry,[1] the neglect and default of pilot, master, or crew in the navigation of the ship,[2] and all and every the dangers and accidents[3] of the seas, rivers, and navigation of whatever nature or kind[4] excepted, unto or to his assigns, they paying[5] freight for the said goods, and all other conditions[6] as per charterparty, with primage and average accustomed.[7] The ship is not liable for leakage[8] or breakage,[9] loss or damage by heat, sweat, rust, or decay, unless

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10 East, 530) as distinguished from an expected (*Rodocanachi* v. *Elliott*, L. R. 8 C. P. 665, 670) restraint. See *Smith* v. *Rosario Co.*, [1894] 1 Q. B. 174; *Nobel's Co.* v. *Jenkins*, [1896] 2 Q. B. 326.

[1] *Earle* v. *Rowcroft*, 8 East, 126; 9 R. R. 385; *Cory* v. *Burr*, 8 App. Cas. 399, 405. *Ante*, p. 143.

[2] These words do not apply to a loss occasioned by the personal negligence or default of the shipowner; as where he knowingly appoints an incompetent master, and the loss arises from the incompetency: *Chartered Mercantile Bank of India* v. *Netherlands Co.*, 10 Q. B. D. 532; but they apply though the master is part owner: *Westport Co.* v. *McPhail*, [1898] 2 Q. B. 130. Sometimes the words "or otherwise" are here added, in which case damage caused by negligent stowing by a stevedore will be within the exception: *Norman* v. *Binnington*, 25 Q. B. D. 475; *Baerselman* v. *Bailey*, [1895] 2 Q. B. 301.

[3] A collision arising from negligence is within this exception: *Wilson* v. *Owners of Cargo per Xantho*, 12 App. Cas. 503, overruling *Woodley* v. *Michell*, 11 Q. B. D. 47. See, further, *The Thrunscoe*, [1897] P. 301. As to what are "perils of the sea," see *per* Lord Herschell, 12 App. Cas. 509. Theft (*De Rothschild* v. *Royal Mail Co.*, 7 Ex. 734) is not within this exception.

[4] This includes loss by pirates (*Pickering* v. *Barkley*, Sty. 132; *Barton* v. *Wolliford*, Comb. 56); by collision not occasioned by negligence (*Chartered Mercantile Bank of India* v. *Netherlands Co.*, 10 Q. B. D. 530); by sea-water passing through a hole made by rats, without negligence on the part of the master or crew (*Hamilton* v. *Pandorf*, 12 App. Cas. 518); by rats damaging the goods (*Kay* v. *Wheeler*, L. R. 2 C. P. 302); but, having regard to the implied warranty by the shipowner of seaworthiness at the commencement of the voyage (*Lyon* v. *Mells*, 5 East, 428; 7 R. R. 726; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377), the exceptions have no application to a ship which was unseaworthy at the time of sailing, and whose unseaworthiness was the efficient cause of the loss or damage: *The Glenfruin*, 10 P. D. 103; *Steel* v. *State Line Co.*, 3 App. Cas. 72; *Gilroy* v. *Price*, [1893] A. C. 56; *Maori King* v. *Hughes*, [1895] 2 Q. B. 550; *Queensland Bank* v. *P. & O. Co.*, [1898] 1 Q. B. 567. As to what is "seaworthiness," see *ante*, p. 146.

[5] *I.e.* to the shipowner: *Shepard* v. *De Bernales*, 13 East, 565; 12 R. R. 442.

[6] "Conditions" means those to be performed by the consignees, not the conditions for the benefit of the shipowner in the charterparty: *Russell* v. *Niemann*, 17 C. B. N. S. 163; see *Gullischen* v. *Stewart*, 11 Q. B. D. 186; 13 Q. B. D. 317; *Serraino* v. *Campbell*, 25 Q. B. D. 501; [1891] 1 Q. B. 283; *Diederichsen* v. *Farquharson*, [1898] 1 Q. B. 150.

[7] *Primage* is a duty at the waterside due to the master and mariners of a ship: to the master for the use of his cables and ropes to discharge the goods; and to the mariners for lading and unlading: Tomline, Dict. s. v. *Primage*. *Average* is a small sum paid to the master above the freight: *Kidston* v. *Empire Insurance Co.*, L. R. 1 C. P. 546.

[8] Whatever be the quantity lost: *Ohrloff* v. *Briscall*, L. R. 1 P. C. 231.

[9] Unless the leakage or breakage arises

occasioned by improper stowage or for any damage[1] to any goods which is capable of being covered by insurance.

In witness whereof the master or purser of the said ship hath affirmed to bills of lading all of this tenor and date, the one of which bills being accomplished, the other [ ] to stand void.

Dated

A CHARTERPARTY.[2]

IT IS THIS DAY MUTUALLY AGREED between A. B., owner of the good ship or vessel, called the A 1 of the measurement of tons or thereabouts,[3] now[4] in the port of [or now at sea having sailed weeks ago], and C. D. on behalf of E. F., merchants; that the said ship being tight, staunch and strong, and every way fitted for the voyage shall with all convenient speed sail and proceed in the usual and customary manner with usual dispatch according to the custom of the port [or in regular turn] [or shall sail from on or before the] except in the case of accidents beyond the charterer's control[5] to , or so near thereunto as she may safely get,[6] and there shall load[7] from the factors of

from the default of the shipowner or master's servants or crew: *Phillips* v. *Clark*, 2 C. B. N. S. 156; *Czech* v. *General Steam Nav. Co.*, L. R. 3 C. P. 14. Damage done to goods by leakage or breakage of other goods is not within the exception: *Thrift* v. *Youle*, 2 C. P. D. 432.

[1] This does not include theft: *Taylor* v. *Liverpool Co.*, L. R. 9 Q. B. 546.

[2] *Ante*, p. 112.

[3] The statement that the ship is of a particular class is a condition which is fulfilled if the ship is of that class at the time when the charterparty is made: *French* v. *Newgass*, 3 C. P. D. 163; *Hurst* v. *Usborne*, 18 C. B. 144; *Routh* v. *Macmillan*, 2 H. & C. 750. See, as to conditions precedent and warranties, *ante*, pp. 66, 67.

[4] The statements as to the place where the ship is lying (*Behn* v. *Burness*, 3 B. & S. 751), as to the time when it sailed (*Ollive* v. *Booker*, 1 Ex. 416), that it shall sail at a certain date (*Glaholm* v. *Hays*, 2 M. & Gr. 257; *Croockewit* v. *Fletcher*, 1 H. & N. 893), that it has "now sailed or is about to sail" (*Bentsen* v. *Taylor*, [1893] 2 Q. B. 274), and (unless the charterparty operates as a demise of the ship) a statement that the ship is tight, &c. (*Steel* v. *State Line Co.*, 3 App. Cas. 77; *Stanton* v. *Richardson*, L. R. 7 C. P. 421), are conditions precedent. But a statement that the ship shall sail at some uncertain time, as "with all convenient speed," "within a reasonable time," "with the first favourable wind," is a warranty only: *MacAndrew* v. *Chapple*, L. R. 1 C. P. 643; *Behn* v. *Burness*, 3 B. & S. 754.

[5] An ordinary event of nature, such as a snowstorm, is not an accident: *Fenwick* v. *Schmalz*, L. R. 3 C. P. 313.

[6] *I.e.*, the ship must go to the place named, unless there is some obstacle, physical or other (*Nelson* v. *Dahl*, 12 Ch. D. 568; 6 App. Cas. 38), which prevents her from going there for what would be an unreasonable time, having regard to the intentions of charterer and shipowner. See *Tharsis Co.* v. *Morel*, [1891] 2 Q. B. 647.

[7] In the absence of special agreement the shipowner has to load the cargo

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the said a full and complete cargo, say about tons[1] not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture (the charterer's stevedore to be employed by the ship), and being so loaded shall therewith proceed to , or so near thereunto as she may safely get[2] and deliver the same in the usual and customary manner[3] on being paid freight as follows: viz., shillings per ton delivered (the act of God,[4] the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage,[5] always excepted).[6] The freight to be paid on unloading and right delivery of the cargo,[7] running days[8] are to be allowed the said merchant (if the ship is not sooner dispatched), for loading the said ship at , and days on demurrage[9] over and above the said lying-days at £ per day, days of detention by ice not to be reckoned as lying-days.[10] It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, but the owners of the ship to

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properly (*Blaikie* v. *Stembridge*, 6 C. B. N. S. 894; *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86) and to supply the necessary ballast (*Southampton Steam Colliery Co.* v. *Clarke*, L. R. 6 Ex. 57), and there is no objection to his taking merchandise which occupies the same space as common ballast and receiving freight for it (*Towse* v. *Henderson*, 4 Ex. 890). The words "usual and customary manner" have reference to mode of, but not to time occupied in, loading: *Tapscott* v. *Balfour*, L. R. 8 C. P. 46; *Kay* v. *Field*, 10 Q. B. D. 241.

[1] See *Morris* v. *Levison*, 1 C. P. D. 155.

[2] *Capper* v. *Wallace*, 5 Q. B. D. 163; *The Alhambra*, 6 P. D. 68.

[3] The shipowner and charterer must each perform such parts of the duty of delivering as according to the custom of the port fall on them respectively: *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; 5 *id.* 544; *Petersen* v. *Freebody*, [1895] 2 Q. B. 294; *Aktieselkab Helios* v. *Ekman*, [1897] 2 Q. B. 83. As to how a reasonable time for discharge of cargo is to be determined, see *Postlethwaite* v. *Freeland*, 5 App. Cas. 599; *Hick* v. *Rodocanachi*, [1891] 2 Q. B. 626; [1893] A. C. 22; *Castlegate Steamship Co.* v. *Dempsey*, [1892] 1 Q. B. 854; *Good* v. *Isaacs*, [1892] 2 Q. B. 555. See, as to the place or the port where delivery is to be made, *Nielsen* v. *Wait*, 16 Q. B. D. 67.

[4] *Ante*, p. 29, n. 10.

[5] See *The Carron Park*, 15 P. D. 203.

[6] *Ante*, p. 415, as to these exceptions.

[7] *I.e.*, payment and delivery are to be concurrent: *Miedbrodt* v. *FitzSimon*, L. R. 6 P. C. 314.

[8] "Running days" mean calendar days, and not periods of 24 hours (*The Katy*, [1895] P. 56), and *primâ facie* mean consecutive days; but the custom of the port may be proved to show that Sundays, Saints' Days, or other holidays are not to be counted: *Nielsen* v. *Wait*, 16 Q. B. D. 67. See *Rhymney Co.* v. *Iberian Co.*, 79 L. T. 240.

[9] Demurrage is payable if the cargo is not unloaded within a reasonable time, if no time is fixed: *Budgett* v. *Binnington*, [1891] 1 Q. B. 35; or, when the time fixed, if it is not unloaded within the time fixed, unless the delay is the fault of the shipowner: *Randall* v. *Lynch*, 12 East, 179; 11 R. R. 340; *Thiis* v. *Byers*, 1 Q. B. D. 244; *Porteus* v. *Watney*, 3 Q. B. D. 223.

[10] See *Nielsen* v. *Wait*, 16 Q. B. D. 71.

have an absolute lien on the cargo for all freight, dead freight,[1] and demurrage.[2] Penalty for non-performance of this agreement, £ .

MARINE POLICY.[3]

S.G.

£ .

Delivered the day of 186 . . No. .

BE IT KNOWN that as well in own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause and them and every of them, to be insured, lost or not lost,[4] at and from ,[5] upon any kind of goods and merchandise,[6] and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the ,[7] whereof is master, under God for this present voyage,—or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship , upon the said ship, &c. , and shall so continue and endure, during her abode there, upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or

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[1] As to the meaning of "freight" and "dead freight," see *ante*, p. 112.

[2] This clause, which is called the "cesser" clause, only relieves the charterers from so much of their liability under the charterparty as is co-extensive with, or equivalent to, the lien given to the shipowner, and leaves them liable for that which is not covered by the lien, *e.g.*, damages for detention at the port of loading: *Clink* v. *Radford*, [1891] 1 Q. B. 625; *Dunlop* v. *Balfour*, [1892] 1 Q. B. 507; *Hansen* v. *Harrold*, [1894] 1 Q. B. 612.

[3] See *ante*, p. 140. This is the form given in 30 Vict. c. 23, schedule E. This Act is repealed by 54 & 55 Vict. cc. 38 and 39.

[4] See *ante*, p. 141.

[5] See *ante*, p. 144.

[6] "Goods and merchandise" does not, in the absence of special usage (*Milward* v. *Hibbert*, 3 Q. B. 120), include goods carried on deck: *Blackett* v. *Royal Exchange Insurance Co.*, 2 Cr. & J. 250.

[7] If the thing assured is sufficiently described, an error in the name of the ship is not material: *Ionides* v. *Pacific Insurance Co.*, L. R. 6 Q. B. 674; 7 *id.* 517.

Forms.

places whatsoever without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at .[1]

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are, of the seas, men-of-war, fire,[2] enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people[3] of what nation, condition, or quality soever, barratry of the master and mariners,[4] and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof; and in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue,[5] labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to the insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part,[6] our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of .

Suing and labouring clause.

In witness whereof, we the assurers have subscribed our names and sums assured in .

Memorandum.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent. unless general, or the ship be stranded.[7]

---

[1] See *ante*, p. 140.

[2] See *The Knight of St. Michael*, [1898] P. 30.

[3] *Ante*, p. 415, n. 11.

[4] *Ante*, pp. 143, 416.

[5] See *ante*, p. 144.

[6] The amount which the assured is entitled to recover from each insurer bears the same rate to the amount insured by him as the total amount becoming due bears to the total amount insured by the policy: *Wilson* v. *Nelson*, 5 B. & S. 356.

[7] As to this clause, see *ante*, p. 145.

FORM OF LETTERS PATENT.[1]

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith: To all to whom these presents shall come greeting:

Whereas John Smith, of 29 Perry Street, Birmingham, in the county of Warwick, Engineer, hath by his solemn declaration represented unto us that he is in possession of an invention for "Improvements in sewing machines," that he is the true and first inventor[2] thereof, and that the same is not in use by any other person to the best of his knowledge and belief:

And whereas the said inventor hath humbly prayed that we would be graciously pleased to grant unto him (hereinafter together with his executors, administrators, and assigns, or any of them, referred to as the said patentee), our royal letters patent for the sole use and advantage of his said invention:

And whereas the said inventor hath by and in his complete specification[3] particularly described the nature of his invention:

And whereas we being willing to encourage all inventions which may be for the public good, are graciously pleased to condescend to his request.

Know ye, therefore, that we, of our especial grace, certain knowledge, and mere motion, do by these presents, for us, our heirs, and successors, give and grant unto the said patentee our especial licence, full power, sole privilege, and authority, that the said patentee by himself, his agents, or licensees, and no others, may at all times hereafter during the term of years herein mentioned, make, use, exercise and vend the said invention within our United Kingdom of Great Britain and Ireland, and Isle of Man, in such manner as to him or them may seem meet, and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention, during the term of fourteen years from the date hereunder written of these presents: and to the end that the said patentee may have and enjoy the sole use and exercise and the full benefit of the said invention, we do by these presents for us, our heirs and successors, strictly command all our subjects whatsoever within our United Kingdom of Great Britain and Ireland, and the Isle of Man, that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice

---

[1] *Ante*, p. 220. This is the form given in the schedule to the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).

[2] *Ante*, p. 223. [3] *Ante*, p. 227.

Forms.

the said invention, or any part of the same, nor in anywise imitate the same nor make or cause to be made any addition thereto or subtraction therefrom, whereby to pretend themselves the inventors thereof, without the consent, licence or agreement of the said patentee in writing under his hand and seal, on pain of incurring such penalties as may be justly inflicted on such offenders for their contempt of this our Royal command, and of being answerable to the patentee according to law for his damages thereby occasioned: Provided that these our letters patent are on this condition, that, if at any time during the said term it be made to appear to us, our heirs, or successors, or any six or more of our Privy Council, that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention[1] as to the public use and exercise thereof within our United Kingdom of Great Britain and Ireland, and Isle of Man, or that the said patentee is not the first and true inventor thereof within this realm as aforesaid, these our letters patent shall forthwith determine, and be void to all intents and purposes, notwithstanding anything hereinbefore contained: Provided also, that if the said patentee shall not pay all fees by law required to be paid in respect of the grant of these letters patent, or in respect of any matter relating thereto at the time or times, and in manner for the time being by law provided: and also if the said patentee shall not supply or cause to be supplied, for our service all such articles of the said invention as may be required by the officers or commissioners administering any department of our service,[2] in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled in manner for the time being by law provided, then, and in any of the said cases, these our letters patent, and all privileges and advantages whatever hereby granted, shall determine and become void, notwithstanding anything hereinbefore contained: Provided also, that nothing herein contained shall prevent the granting of licences in such manner and for such considerations as they may by law be granted: And lastly, we do by these presents for us, our heirs and successors, grant unto the said patentee that these our letters patent shall be construed in the most beneficial sense for the advantage of the said patentee. In witness whereof we have caused these our letters to be made patent this one thousand eight hundred and and to be sealed as of the one thousand eight hundred and

(Seal of Patent Office.)

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[1] *Ante*, p. 221.

[2] *Ante*, p. 233.

BILL OF SALE.[1]

FORM IN SCHEDULE TO BILLS OF SALE ACT, 1882.

THIS INDENTURE made the day of , between A. B., of of the one part, and C. D., of of the other part, witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*], he the said A. B. doth hereby assign unto C. D., his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of £ per cent. per annum [*or whatever else may be the rate*]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A. B. doth also agree with the said C. D. that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D., for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said A. B. in the presence of me E. F. [*add witness's name, address, and description*].

---

[1] Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), Schedule. See *ante*, p. 102.

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